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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

Orson, Inc., t/a Roxy Screening Rooms,

Petitioner,

v.

Miramax Film Corporation,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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DATED: NOVEMBER 18, 1999

QUESTIONS PRESENTED

1. Whether § 106 of the Copyright Act conflicts with and preempts a state statute that seeks to curtail anticompetitive conditions in the motion picture exhibition business by placing a six-week limit on the duration of exclusive motion picture copyright licenses known in the trade as "clearances."

2. Whether, under § 1 of the Sherman Act, the "rule of reason" by which vertical nonprice restraints of trade are to be analyzed permits the conclusion, reached without factual analysis, that clearances that insulate the licensed exhibitor from competition are reasonable per se.

LIST OF PARTIES

Petitioner Orson, Inc., a corporation which did business at the relevant times under the name "Roxy Screening Rooms," has no parent companies or nonwholly owned subsidiaries.

The respondent is Miramax Film Corporation, which Petitioner believes to be a wholly owned subsidiary of Walt Disney Company, a publicly owned company.

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Petitioner Orson, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are reported at 79 F.3d 1358 (3d Cir. 1996) ("Orson I"), at 174 F.3d 377 (3d Cir. 1999), and at 189 F.3d 377 (3d Cir. 1999) (en banc) ("Orson II"). Copies of these opinions are reprinted in the Appendix beginning at 20a, 68a and 92a, respectively. The district court's initial opinion on the merits is reported at 862 F.Supp. 1378 (E.D. Pa. 1994), and its subsequent opinion at 983 F.Supp. 624 (E.D. Pa. 1997). These opinions are reprinted in the Appendix beginning at 1a and 46a, respectively.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit issued its final opinion in this case, en banc, on August 20, 1999. Appendix at 92a. This petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves § 1 of the Sherman Act, 15 U.S.C. § 1, and §§ 106 and 301 of the Copyright Act, 17 U.S.C. §§ 106 and 301. These statutory provisions are reprinted in the Appendix at 112a and 113a. The case also involves various sections of the Pennsylvania Feature Motion Picture Fair Business Practices Law, 73 Pa. Cons. Stat. Ann. §§ 203-1 et seq. The Pennsylvania Statute is reprinted in its entirety in the Appendix at 108a-112a.

STATEMENT OF THE CASE

In January, 1992 Petitioner Orson, Inc. ("Orson") began to operate a two-screen movie theater in central Philadelphia.

Pennsylvania, known as the Roxy Screening Rooms (the "Roxy"), that exhibited art films. Orson ceased operating the Roxy in October, 1994. Respondent Miramax Film Corporation ("Miramax"), which was acquired by the Walt Disney Company in 1993, is the industry leader in the distribution of art films, including such films as "The Crying Game," "Delicatessen," "Enchanted April," "Farewell My Concubine," "The Piano" and "Reservoir Dogs." The Roxy, as operated by Orson, was driven out of business in October, 1994 because of its inability to obtain licenses from Miramax to exhibit Miramax art films.

Over the period that Orson operated the Roxy, it consistently but unsuccessfully sought licenses to exhibit Miramax' first-run art films. Yet each time the Roxy bid against the only other art film exhibitor in central Philadelphia, a substantially larger exhibitor known as the Ritz Theaters (the "Ritz"), Miramax refused to grant the Roxy a license and issued one to the Ritz instead, despite the fact that the Roxy offered Miramax more favorable financial terms for the license. Prior to the filing of this lawsuit, Miramax agreed to license films to the Roxy for subsequent runs, but Miramax continued to grant exclusive first-run licenses only to the Ritz. The duration of the exclusive first-run licenses granted to the Ritz exceeded six weeks.

Orson commenced this action against Miramax in August, 1993, alleging that Miramax had conspired with the Ritz to eliminate competition in the central Philadelphia art-film market by agreeing to deny the Roxy any Miramax film on a first-run basis, in violation of §1 of the Sherman Act, 15 U.S.C. § 1, and Pennsylvania's common law prohibition against undue restraints of trade. In addition, Orson alleged that Miramax violated § 7 of Pennsylvania's Feature Motion Picture Fair Business Practices Law, 73 Pa. Cons. Stat. Ann. § 203-7 (the "Pennsylvania Statute"), by granting its long-term exclusive licenses to the Ritz. That state statutory section, headed "Length of Run," provides in material part that

> [n]o license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run [of a copyrighted motion picture] ... for more

> than 42 days without provision to expand the run to second run or subsequent run theaters within the geographical area....

Orson's charge that Miramax' long-term exclusive licensing agreements, referred to generically in the trade as "clearances," violated §1 of the Sherman Act is not a routine antitrust challenge to the reasonableness of such licenses. Instead, this case involves a clandestine conspiracy between Miramax and the Ritz under which Miramax would refuse to deal with the Roxy, with the clearances providing the vehicle by which the conspiracy was effected. Unlike legitimate clearance agreements, Miramax never evaluated the licensing terms offered by the Ritz on a movie-by-movie basis, and never made a reasoned decision that a particular movie was appropriate for a long-term, exclusive first run at the Ritz. Rather, the exclusivity agreements entered into between Miramax and the Ritz generally contained the same standard terms, and the Ritz obtained exclusive licenses for every Miramax movie that it wished to exhibit, regardless of the more favorable terms offered by the Roxy for many of those same movies. Thus the clandestine agreement between the Ritz and Miramax foreclosed the competition in the central Philadelphia art-film market that the Ritz would otherwise have faced from the Roxy, including the price competition that would have resulted from the Roxy's lower ticket prices.

The existence of the clandestine agreement between Miramax and the Ritz is clearly borne out by their conduct in connection with the exclusive licensing of Miramax films. The record evidence shows that Miramax agreed to grant clearances to the Ritz before Miramax invited bids on the licenses from other exhibitors in central Philadelphia. Miramax would then engage in a sham bidding process, whereby it would act as if the licenses were still available to other exhibitors by announcing trade screenings of the movie to be "offered," and then purport to accept bids for the first-run license that had already been granted to the Ritz. As is often the case in antitrust conspiracies, there is no record evidence of an explicit agreement between Miramax and the Ritz. Miramax' established practice of granting exclusive licenses to the Ritz before

bids were even solicited from other exhibitors, however, demonstrates that Miramax and the Ritz conspired and acted together to eliminate the Ritz' competition in the central Philadelphia art-film market. The clear purpose and effect of this conspiracy was to drive the Roxy out of business.

In support of its claims under § 203-7 of the Pennsylvania Statute, Orson adduced essentially uncontroverted evidence that Miramax willfully and intentionally violated the Pennsylvania law by agreeing to grant exclusive first-run licenses of its films to the Ritz for more than 42 days without providing for the expansion of the run to subsequent-run theaters within central Philadelphia. The evidence also showed that Miramax recklessly and willfully disregarded the 42-day limitation of § 203-7, and that it violated § 203-4 of the Pennsylvania Statute by failing to exhibit its films to exhibitors prior to the exhibitors' bidding, all as part of an intentional scheme to avoid compliance with the state law.

The district court initially granted Miramax' motion for summary judgment on all of Orson's claims, except for a portion of one claim that was dismissed without prejudice on the parties' agreement. Appendix at 19a. On appeal, the Third Circuit affirmed the grant of summary judgment on Orson's antitrust claims, but vacated the district court's judgment on Orson's claims under the Pennsylvania Statute, rejecting Miramax' argument that the state law is preempted by the Copyright Act. Appendix at 45a. On remand, a jury returned a verdict in Orson's favor on its claim under § 203-7, and the district court entered judgment on that claim in Orson's favor. Appendix at 46a. (At trial, the jury found that Miramax intentionally violated the Pennsylvania Statute with respect to 17 separate films.) On Miramax' appeal, the Third Circuit abandoned its earlier views on the constitutionality of § 203-7 of the Pennsylvania Statute, and concluded that the state law is preempted by §106 of the Copyright Act. Appendix at 89a. On rehearing en banc, the court of appeals explicitly overruled its earlier, contrary decisions on the constitutionality of the Pennsylvania Statute, and held that the

Copyright Act does indeed preempt the state law.[1] Appendix at 92a. Orson now seeks this Court's review of the court of appeals' the decisions on the constitutionality of the state law, and on Orson's the antitrust claims.

REASONS FOR GRANTING THE WRIT

I. The court of appeals' conclusion that the Pennsylvania Statute is preempted by the Copyright Act is inconsistent with this Court's decisions on the scope of the Copyright Act, the Act's preemptive reach, and "conflict preemption" methodology.

The court of appeals, in Orson I, interpreted § 203-7 of the Pennsylvania Statute to "prohibit[] a distributor [Miramax] and exhibitor [the Ritz] from entering into a license agreement [for a copyrighted film] which grants an exclusive first-run for more than 42 days without providing for expansion in the same geographic area covered by the license." Appendix at 44a. As so interpreted, § 203-7 renders the long-term "clearances" issued to the Ritz unlawful.

In ruling that § 203-7 is preempted by the Copyright Act, the court of appeals concluded, explicitly or in effect, that (i) the right conferred by 17 U.S.C. § 106 to "distribute" copyrighted films vests in the copyright holder an absolute right to grant exclusive licenses to film exhibitors for an unlimited duration; (ii) § 203-7 -- and, by necessary implication, other state and federal statutory provisions similarly intended to foster competition -- must be viewed as "directly regulat[ing]" this absolute licensing "right," Appendix at 104a; and, therefore, (iii) § 203-7 "stands as an obstacle to the

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[1] In addition to abandoning its initial decision in this case that § 203-7 was not preempted, the court of appeals effectively overruled two earlier decisions, rendered in the 1980s, that had held that the Copyright Act did not "conflict" with and preempt the state statute. See Associated Film Distribution Corp. v. Thornburgh, 683 F.2d 808 (3d Cir. 1982), and Associated Film Distribution Corp. v. Thornburgh, 800 F.2d 369 (3d Cir. 1986), cert. denied, 480 U.S. 933 (1987).

accomplishment and execution of the full purposes and objectives of Congress" as embodied in § 106 of the Copyright Act, and is preempted. Appendix at 100a (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). In these respects, the court of appeals' ruling runs squarely counter to this Court's prior decisions on the nature and scope of a copyright holder's right to grant an exclusive license; on the extent to which state or federal legislation that promotes competition can be said to interfere or "conflict" with the licensing right; and on the fact that, ordinarily, § 106 has no preemptive impact on such legislation.

A. The Copyright Cases

For more than 60 years the Court's decisions have made clear that nothing in the federal copyright law, nor in Congress' "purposes and objectives" in enacting that law, confers on the holder of a motion picture copyright the unfettered privilege to license his work free of any restriction that might be imposed by other legislation. Thus, for example, in Fox Film Corp. v. Doyal, 286 U.S. 123 (1932), the Court rejected the contention that the holder's right to "multiply and vend copies" of the copyrighted work immunized the resulting royalties from the burden of state taxation. Id. at 127. In so doing, the Court made clear that the protection afforded by copyright is, in essence, the "right to exclude others" from performing or displaying the copyrighted work, not the absolute right to dictate, for all time, all of the conditions under which the work will be performed or exhibited:

> The [copyright] statute confers upon the author after publication the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute in relation to the subject matter, U.S.C. Tit. 17. In creating this right the Congress did not reserve to the United States any interest in the production itself, or in the copyright, or in the profits that may be derived from its use. Nor did Congress provide that the right, or gains from its use, would be free of tax. The owner

> of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.

286 U.S. at 127 (emphasis added).

Seven years after Fox Film, the Court held that a motion picture copyright owner's "right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it" does not encompass the right to use the license as an "implement[] for restraining commerce" in violation of the antitrust laws. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939). Interstate Circuit thus made clear that the copyright law affords no safe harbor from pro-competitive economic regulation, particularly where the purpose or effect of a licensing arrangement is to insulate licensees -- in that case, as in this, dominant theater owners -- from the competitive forces of the marketplace. Id. at 231.

In 1941 the Court reaffirmed this principle -- that the protection of copyright does not shield the holder from all regulation of his exclusive right to license -- with respect to state legislation designed to curtail or prohibit anticompetitive behavior. See Watson v. Buck, 313 U.S. 387, 404 (1941).[2] Then, on the heels of Fox Film, Interstate Circuit and Watson, the Court confronted the question in the context of exclusive motion picture copyright licenses substantially like those held by the court of appeals in this case to be immune from regulation. In United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), the Court declined to overturn an injunction that prohibited a species of motion picture licensing arrangement known as a "clearance" -- that is, an exclusive license

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[2] Watson made clear what was at least implicit in Fox Film, that is, that the Copyright Act itself, in conferring the right to grant an exclusive license, was not intended to exempt the copyright license, the contractual relationship it creates, or the royalties that result from it, federal or state market regulation. The Court thus noted in Watson that "w[e] find nothing in the copyright laws which purports to grant to copyright owners the privilege of combining in violation of otherwise valid state or federal laws." 313 U.S. at 404 (emphasis added).

under which the film distributor (the holder of the copyright) assures the exhibitor-licensee that the film will not be licensed to a competing theater "either at the same time or so soon thereafter that the exhibitor's expected income from the run will be greatly diminished." Id. at 145. Against arguments that the regulation of clearances would limit the distributor's freedom to maximize the economic benefits of his copyright, the Court observed that "[t]he copyright law, like the patent statutes, makes reward to the owner [of the copyright] a secondary consideration." Id. at 158. Thus the Copyright Act "affords no haven" to an exclusive copyright license whose purpose or effect is "to suppress competition" with the licensee. Id. at 144.[3]

The court of appeals' decision in this case cannot be squared with the principle that emerges from this Court's earlier decisions limiting the scope of the copyright holder's exclusive licensing right. This conclusion is made dramatically apparent by the lip service the Third Circuit paid to the principle, and the device to which it resorted to undercut the principle altogether.

First, the court of appeals acknowledged that in its first case involving the Pennsylvania Statute, a facial preemption challenge to the provisions of the state law had been rejected. The court characterized its earlier decision, however, as having held that all provisions of the Pennsylvania Statute except the 42-day limitation of § 203-7 fell within the reach of the Paramount-Watson-Interstate-Fox Film principle:

> In AFD II, we recognized that statutes that bar exaction of advances from exhibitors, limit guarantees, and regulate the bidding and negotiation

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[3] As the Court noted in Paramount, a cognate principle had been recognized earlier in the context of the patent statute. Paramount, 334 U.S. at 144 (citing United States v. United States Gypsum Co., 333 U.S. 364, 401 (1948)). The Third Circuit itself has acknowledged that a similar principle limits the rights conferred by the Lanham Act. See Mariniello v. Shell Oil Co., 511 F.2d 853, 857 (3d Cir. 1975).

> process may keep a distributor from achieving the optimal monetary return for the film.... Nonetheless, we concluded that a reasonable government regulation that seeks to remedy problems caused by the economic disparity that impedes fairness in bargaining and honesty in business dealings, is not impermissible merely because it has an economic effect on those regulated.

Appendix at 85a. (citations omitted).[4]

In attempting to reconcile its preemption ruling in this case with its earlier acceptance of the principle that copyright licensing is indeed subject to "reasonable government regulation that seeks to remedy the problems caused by economic disparity," the court of appeals went on to characterize the provisions of the Pennsylvania Statute, except the 42-day limitation, as mere "market regulations." Appendix at 104a. Such regulations "do not create a preemption issue," the court reasoned, "because they only touch copyrighted works indirectly, if at all." Id. (emphasis added). The 42-day limitation, on the other hand, "directly regulates a right that is protected by federal copyright law," since the limitation is somehow "copyright based in essence" insofar as it may require the copyright holder to "expand its distribution" after a 42-day exclusive run, in a fashion that may be "involuntary and uneconomic." Appendix at 104a. The unspoken premise of the court's rationale is clear: the right to grant an exclusive copyright license necessarily encompasses the right to keep the work away from the licensee's competitors for an unlimited duration, no matter how anticompetitive the consequences may be.

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[4] The court of appeals' reference to "AFD II" is to Associated Film Distribution Corp. v. Thornburgh, 800 F.2d 369 (3d Cir. 1986), cert. denied, 480 U.S. 933 (1987), the appeal from the district court's decision after the remand ordered by the court of appeals' first ruling on the Pennsylvania Statute in "AFD I", or Associated Film Distribution Corp. v. Thornburgh , 683 F.2d 808 (3d Cir. 1982). In AFD I the Third Circuit had rejected a facial preemption challenge to the entire statute, including the 42-day exclusive licensing provision of § 203-7, on the basis of Paramount, Fox Film and Watson. See 683 F.2d at 814-16.

This Court's decisions, of course, render the court of appeals' conclusion utterly unsupportable. It is clear, first, that whatever the precise nature and extent of the "exclusivity" that attends the licensing right under § 106 of the Copyright Act, the holder's decision to exercise the right subjects licensor and licensee to state or federal regulation insofar as the exclusive license may have the effect of "suppress[ing] competition," Paramount, 334 U.S. at 144, or may be used as an "implement[] for restraining commerce," Interstate Circuit, 306 U.S. at 228. Moreover, by injecting into the licensing right conferred by § 106 a concomitant "right" to license exclusively for as long as licensor and licensee choose, the Third Circuit's decision neglects this Court's pronouncement that the copyright is adequately protected by recognition of the holder's privilege to "refrain from the vending or licensing," and by permitting him "simply [to] exercis[e] the right to exclude others from using his property." Fox Film, 286 U.S. at 127 (emphasis added). Indeed, the court of appeals, without any reference to Fox Film at all, rejected out of hand Orson's argument that "once a copyright holder ... makes an initial distribution, a state is free to regulate the manner in which the work is thereafter distributed." Appendix at 105a.

Beyond disregarding the general import of this court's prior decisions on the scope of the copyright holder's right to exclusive licensing, the court of appeals chose to overlook that the very practice at which the 42-day limitation is aimed -- exclusive licenses or "clearances" "unduly extended as to area or duration" -- had been held by the Court in Paramount to be subject to otherwise valid, pro-competitive legislation. See 334 U.S. at 145.

There is no question that the 42-day limitation on the duration of exclusive licenses contained in § 203-7 is, in the Third Circuit's own parlance, a "market regulation," not an effort to create "copyright-based rights." Indeed, in its initial analysis of the interplay between the 42-day limitation and § 106 of the Copyright Act, the court of appeals had characterized Pennsylvania's limit on the duration of "first runs" as, on its face, "no threat to the copyrights themselves," and had noted that

> the [Pennsylvania Statute] does not take away from [copyright holders] and give to another the right to reproduce the film, to prepare derivative works based on the film, to distribute the film, or to license its performance.

Associated Film Distribution Corp., 683 F.2d at 816.

The literal terms of the state law confirm that its objectives are to curtail the anticompetitive consequences of unduly lengthy film licenses, and especially the impact on small, independent theaters. Section 203-2 of the Pennsylvania Statute thus provides that among its purposes are to "foster vigorous and healthy competition in offering feature motion pictures" by "prohibiting practices through which fair and honest competition is restrained;" preventing motion picture licensing practices from "reducing the number of small independent businesses," that is, small independent theaters; "promot[ing] fair and effective competition" in the movie-exhibition business; and "benefit[ting] the movie going public by limiting the long and extensive first runs so that additional theaters, in a given area, may also exhibit the same feature motion picture and at possibly a lower admission price." Appendix at 108a. In other words, the state statute has as its avowed object the regulation of long-term licensing arrangements that the Pennsylvania legislature has determined would constitute "implement[s] for restraining commerce" by affording a favored exhibitor-licensee an insurmountable competitive edge over other theaters. Interstate Circuit, 306 U.S. at 202.

In summary, § 203-7 of the Pennsylvania Statute is not, as the court of appeals styled it, "copyright-based" at all: it does not interfere with the copyright holder's fundamental right to "refrain from vending or licensing" or to "content himself with simply exercising the right to exclude others from using his property." Fox Film, 286 U.S. at 127. Quite to the contrary, the state law merely provides that if the holder determines to grant an exhibitor an exclusive first-run license to show a copyrighted motion picture -- a "clearance" -- he may not thereafter "suppress competition" among

exhibitors by "unduly extend[ing]" the clearance for a period exceeding 42 days. Paramount, 334 U.S. at 145. This Court's decisions confirm that nothing in the Copyright Act protects such anticompetitive conduct, and thus the court of appeals was plainly wrong in striking down § 203-7 as an impediment to "the purposes and objectives of Congress." Jones v. Rath Packing Co., 430 U.S. at 525.

B. The Preemption Cases

The court of appeals concluded that § 203-7 of the Pennsylvania Statute is preempted because of a "conflict" with § 106 of the Copyright Act -- that is, that the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Appendix at 100a (quoting Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977)).[5] Of course, the cornerstone of this holding was the court's expansive, and fundamentally incorrect, interpretation of the scope of the licensing right conferred by 17 U.S.C. § 106(3), as discussed above. Compounding that threshold error, the Third Circuit failed to take account of this Court's pronouncements on "conflict preemption" generally, and especially on the extent to which courts should hesitate to find conflict preemption where, as here, Congress has expressly limited the preemptive reach of a federal statute.

There is no quarrel, of course, with the general proposition that "conflict preemption" must be found where, as the Third Circuit

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[5] The court of appeals noted that 17 U.S.C. §301 provides expressly for the preemption of state laws conferring rights "equivalent to any of the exclusive rights within the general scope of copyright as specified by [17 U.S.C. §106]." Appendix at 99a. Although the Pennsylvania Statute does not purport to "confer" any rights remotely "equivalent" to those provided under §106, the Court of Appeals did not unequivocally rule out the possibility of express preemption under § 301. In this respect, too, the Miramax decision retreated from the Third Circuit's earlier rulings in Associated Film Distribution Corp., in which the Court had concluded that § 203-7, at least "on its face," did not confer rights "equivalent" to those embodied in §106 of the Copyright Act. See Associated Film Distribution Corp., 683 F.2d at 816 n.11.

recited, a state law truly "stands as an obstacle" to the implementation of Congressional purpose. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); accord, Hillsborough County, Fla. v. Automated Medical Labs., Inc., 471 U.S. 707, 713 (1985). This Court has also made clear, however, that this general proposition must be applied with caution, to ensure that "the historic police powers of the States [are not] to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." International Paper Co. v. Ouellette, 479 U.S. 481, 492 n.11 (1987) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Thus, in any "conflict preemption" case a court should proceed only on "the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" Merrill Lynch, Pierce Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973).

This cautious approach to "conflict preemption" has been reaffirmed with special emphasis in the context of federal copyright law. In considering a copyright preemption question in Goldstein v. California, 412 U.S. 546 (1973), this Court observed that

> [w]e must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone may possibly lead to conflicts and those situations where conflicts will necessarily arise. "It is not...a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty."

Id. at 554-55 (quoting The Federalist No. 32, p. 243 (B. Wright ed. 1961)). In other words, striking down a state law on the basis of a "conflict" is disfavored and, absent an "inevitable collision" of Congress' clear intentions with the provisions of a state statute, a finding of preemption is inappropriate. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963).

Finally, this Court has made clear on several occasions that in seeking to ascertain the "full purposes and objectives of Congress" in a preemption inquiry, significance must be accorded to any express preemption provision included in the federal statute. Thus

> [w]hen Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," Malone v. White Motor Corp., 435 U.S. 497, 505 (1978), "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282 (1987).

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

The court of appeals' decision in this case pays little or no heed to these settled preemption principles. First, the court's opinion does not even purport to discern in §106 of the Copyright Act any "clear and manifest purpose of Congress" to grant copyright holders the right to license their works for an unlimited duration to a single licensee, irrespective of the anticompetitive effect on the licensee's line of commerce. International Paper Co., 479 U.S. at 492 n.11. This is hardly surprising: at least since the Paramount-Watson-Interstate Circuit-Fox Film line of decisions, it has been abundantly clear that this was not Congress' intention at all.

In addition, the court of appeals' opinion reflects no effort to attempt "to reconcile the operation of both statutory schemes with one another" before concluding that the state statute must fall. Merrill Lynch, Pierce Fenner & Smith, 414 U.S. at 127. This failing is particularly notable since, on the previous occasion on which it considered a preemption challenge to the Pennsylvania Statute, the court of appeals readily "reconciled" state and federal law by perceiving, correctly, that "[t]he [Pennsylvania] Act on its face

contains no threat to the copyrights themselves," since it does not "take away from [copyright holder] and give to another the right to reproduce the film, to prepare derivative works based on the film, to distribute the film, or to license its performance." Associated Film Distribution Corp., 683 F.2d at 816. As the Third Circuit had already held, therefore, § 203-7 can easily be "reconciled" with § 106 of the Copyright Act by a candid recognition that the Pennsylvania law, like the Sherman Act and the state statute at issue in Watson v. Buck, reaches an evil -- the restraint of competition among exhibitors -- that the Copyright Act was not intended to shelter.

Nor, of course, did the court of appeals give any weight to the fact that, as reflected in 17 U.S.C. § 301, Congress did consider the extent to which § 106 of the Copyright Act should be given preemptive effect, and conspicuously chose not to include any language that could reasonably be read to insulate licensing rights from the reach of state trade regulation laws. While Congress' limited expression of preemptive intent may not have been the final word, it almost certainly should and would have strengthened the normal presumption against preemption.

II. The court of appeals' preemption ruling conflicts with the Sixth Circuit's interpretation.

In Allied Artists Pictures Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982), aff'g 496 F. Supp. 408 (S.D. Ohio 1980), the Sixth Circuit confronted a copyright preemption issue substantially like that treated by the Third Circuit here. In considering Ohio legislation that, like the Pennsylvania statute, sought to "achieve fair and open bargaining" and curtail anticompetitive conduct in the licensing of copyrighted motion pictures, the Sixth Circuit upheld a district court's conclusion that "nothing in the federal Copyright Act prohibit[s] the state from exercising its police powers to rectify a market situation it perceives as inequitable." Id., 496 F.Supp. at 447.[6]

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[6] The Sixth Circuit approved and effectively incorporated in its own opinion the "thorough analysis" of the preemption issue undertaken by the district court. Allied Artists, 679 F.2d at 663.

The Sixth Circuit held, accordingly, that the Ohio law was not preempted. For at least 13 years, until this case, the Third Circuit subscribed to the analysis in Allied Artists, and to the view that it compelled a finding that §203-7 of the Pennsylvania Statute was not preempted.

The circuit split over regulation of motion picture copyright licensing can only lead to uncertainty and inconsistency in the passage and enforcement of state laws that seek to preserve the viability of small, independent theaters and to ensure wide dissemination of first-run films.[7] Moreover, the two circuits' conflicting views concerning the scope of the copyright licensing privilege raise questions about the susceptibility of anticompetititve licensing arrangements to redress under federal law, including the antitrust laws. Finally, in this age of rapidly changing technology and entertainment media, the implications of the conflict are likely to extend well beyond the relationships between and among movie distributors, their favored exhibitors, and the competing independent theaters.

The contrast in the approaches of the two circuits could not be more pronounced, in at least the following respects:

> (i) The Ohio decision, unlike the Third Circuit's in this case, emphasized that any preemption inquiry involving the Copyright Act must give full heed to the Court's observation in Paramount that "[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration." Allied Artists, 496 F.Supp. at 445 n.20, 446.
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> (ii) The Ohio decision, unlike the Third Circuit's, gave full play to Fox Film's and Watson's rejection of the argument that a copyright holder "is not subject to state regulation of the manner in

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[7] The Third Circuit noted in this case that between 1978 and 1983 "nearly half the states" enacted such laws. Appendix at 83a.

which its [copyrighted] product is marketed," and rejected the contention that the licensing right "include[s] the exclusive right to distribute [the copyrighted work] in the manner deemed most desirable by the copyright holder." Id. at 446.

(iii) The Ohio decision, again invoking this Court's decision in Fox Film, concluded that state restrictions on exclusive licensing in no sense "compel" a copyright holder to engage in activity he is privileged by § 106 of the Copyright Act not to pursue. Thus the Ohio court embraced the view explicitly rejected by the Third Circuit here -- that is, that the copyright holder's rights are fully protected to the extent he remains free not to license his work at all but merely "to prohibit display, performance, reproduction and distribution." Id. at 447.

(iv) The Ohio decision, unlike the Third Circuit's here, noted that state legislation whose purpose is to "further the wide dissemination of copyrighted works" by curtailing restrictive and anticompetitive licensing practices does not "frustrat[e] the objectives of Congress in enacting the Copyright Act," and in fact furthers Congress' "primary object." Id. at 448.[8]

We note, of course, that the Ohio legislation at issue in Allied Artists does not contain a provision limiting the duration of exclusive "first-run" film licenses. Nonetheless, the Ohio provisions upheld

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[8] Other courts treating similar statutes have come to conclusions substantially closer to the Sixth Circuit's than to the Third Circuit's. For example, in Storer Cable Communications v. City of Montogmery, Ala., 806 F.Supp. 1518 (M.D. Ala. 1992), the court stated that state laws which have an "incidental effect" on copyright licensing are not preempted "if their target is anti-competitive conduct beyond the scope of copyright protection." Id. at 1536.

against preemption challenge by the Sixth Circuit directly regulate and restrict the copyright holder's ability to license a motion picture to an exhibitor and, like § 203-7 of the Pennsylvania Statute, have as their purpose the preservation of independent theaters and of competition in the theater business.[9] Moreover, it is not coincidental that in upholding the facial validity of § 203-7 against the first preemption challenge in 1982, the Third Circuit saw fit to adopt in haec verba substantially all of Allied Artists' pertinent language and reasoning. See Associated Film Distribution Corp., 683 F.2d at 814-17. The conflict between the two circuits is very real, and this Court should take the opportunity to rectify it.

III. The decision of the court of appeals on Orson's antitrust claim conflicts with a decision of the court of appeals for the Ninth Circuit.

In affirming the district court's grant of summary judgment against Orson on its antitrust claims, the court of appeals concluded that because the "clearances" in this case are "[v]ertical, nonprice restraints of trade" they are necessarily subject to the "rule of reason." Appendix at 38a (citing Theee Movies of Tarzana v. Pacific Theaters, Inc., 828 F.2d 1395, 1398 (9th Cir. 1987), cert. denied, 484 U.S. 1066 (1988)). In reaching this conclusion, however, the court of appeals ignored the Ninth Circuit's decision in Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988), cert. denied, 488 U.S. 1019 (1989). In Harkins Amusement, the Ninth Circuit held that nonprice, vertical restraints of trade strikingly similar to those at issue here were per se illegal, and were not subject to the rule of reason at all. Id. at 486. The Third Circuit's contrary ruling in this case conflicts squarely with the Ninth Circuit's decision, and this Court should accept review to

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[9] Among other things, the Ohio law requires trade screening to all potential licensees before any license is granted; prohibits copyrighted holders from insisting on guaranteed license payments as well as a division of box office receipts; requires simultaneous opening of bids; and prohibits licensing through negotiation once bids are solicited. Allied Artists, 496 F.Supp. at 420.

resolve that conflict.[10]

In Harkins Amusement an independent film exhibitor brought an antitrust action against regional motion picture exhibitors and national film distributors alleging, inter alia, that they had conspired to boycott the plaintiff and to injure competition. The district court entered summary judgment in the defendants' favor. On appeal, the Ninth Circuit reversed on the ground that a genuine issue existed as to whether the distributors' and regional exhibitors' participation in a market-splitting agreement constituted a group boycott that had the effect of injuring competition in the relevant market.

Initially, the Ninth Circuit addressed the defendant distributors' argument that under United States v. Colgate & Co., 250 U.S. 300, 307 (1919),[11] the distributors had an absolute right to refuse to license films to the plaintiff. The Ninth Circuit rejected this argument, holding that because the agreements at issue constituted joint efforts to disadvantage competitors by inducing "suppliers" -- film distributors -- to deny the availability of film licenses necessary to permit competition in the relevant market, the rule of per se illegality should apply, if indeed the plaintiffs' factual allegations proved to be true. Harkins Amusement, 850 F.2d at 486.

In reaching this conclusion the Ninth Circuit relied upon four

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[10] This Court clearly has the power to review the court of appeals' interlocutory determination of the viability of Orson's antitrust claims in Orson I, even though no attempt was made to secure review of the interlocutory ruling. See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 488 n.6 (1968); Mercer v. Theriot, 377 U.S. 152, 153-54 (1964); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923); and Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 257-58 (1916). Because Orson's state law claims, upon which Orson could have been granted total relief, following trial, remained viable following the decision in Orson I, certiorari was not sought at that time.

[11] The Colgate doctrine holds that, as a general proposition, a manufacturer or other seller is free to "exercise his own independent discretion as to parties with whom he will deal." 250 U.S. at 307.

pertinent statistics that tended to confirm the distributor's participation in a vertical conspiracy to refuse to deal: (1) films were licensed to a "favored" exhibitor 85% of the time; (2) the plaintiff exhibitor, an independent theater owner, was awarded licenses to only 4% of the films that were allocated pursuant to the conspiracy; (3) films were licensed to favored exhibitors on 90 occasions in which the plaintiff had submitted the only written bid; and (4) on 89 occasions, the "winning bidder's" bid was either undated or dated after offers were formally due. Id. at 484.

Statistics substantially like those in Harkins Amusement appear in the record in this case. First, Ritz Theaters, Miramax' favored exhibitor, was granted an exclusive first-run license to every Miramax film that it sought to exhibit, and indeed had a clandestine agreement with Ritz that permitted Ritz to execute an exclusive first-run license before the opportunity to bid was even offered to other exhibitors. Second, the Roxy never was able to compete against the Ritz for Miramax films, because exclusive licensing agreements between Miramax and the Ritz were already in place when Miramax purported to solicit bids from the Roxy and other exhibitors. Third, for many of the Miramax films for which exclusive licenses were granted to the Ritz, the Roxy, the only art-film exhibitor in central Philadelphia other than the Ritz, offered Miramax more favorable economic terms than those ultimately agreed to with the Ritz. The only material differences between this case and Harkins Amusement thus suggest that this case involves an even more egregious conspiracy between a distributor and an exhibitor, the effect of which was to eliminate competition among central Philadelphia exhibitors for the most sought-after and lucrative art films released by the dominant distributor of art films in the United States.

Additionally, the record evidence tended to show that films distributed by companies other than Miramax do not produce sufficient exhibitor revenues to permit the exhibitor to remain competitive, unless licenses to exhibit Miramax films are also awarded. The best evidence for this point, of course, was the fact that the Roxy was driven out of business because of its inability to compete against the Ritz for Miramax licenses, despite the fact that

the Roxy, in many cases, offered Miramax more generous financial terms than did the Ritz for licenses to Miramax films. Unable to compete for licenses for such box-office blockbusters as "The Crying Game," "Farewell My Concubine," and "Delicatessen," the Roxy was simply unable to sustain its operations. The clandestine agreement between Miramax and the Ritz thus had the clear purpose and obvious effect of preventing the Roxy from entering into licensing agreements with Miramax for the nearly all of the most successful art films that were distributed while the Roxy was in operation, insulating the Ritz from the only competition it faced in the central Philadelphia art-film market.

The Ninth Circuit's approach to this flagrantly anti-competitive situation, as enunciated in Harkins Amusement, clearly conflicts with the Third Circuit's forgiving "rule of reason" treatment. This Court should address and resolve this conflict.

IV. Assuming it was appropriate to analyze Miramax' anticompetitive clearances under the rule of reason, the court of appeals incorrectly concluded that clearances are, in effect, per se lawful and reasonable.

Ever since this Court's seminal decision in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), a case-by-case application of the rule of reason has been required in assessing the legality of clearances granted by film distributors to theater exhibitors. In Paramount Pictures, this Court upheld a determination by a three-judge district court that clearance agreements entered into by various motion picture distributors and exhibitors constituted conspiracies to restrain trade in violation the Sherman Act. Id. at 147. This Court endorsed the rule of reason approach employed by the district court, which requires each case to be evaluated on its own facts rather than under per se rules. In particular, the Court held that the fact that the clearances in Paramount had acquired a fixed and uniform character and were in many instances issued without regard to pro-competitive factors was sufficient to support the finding of a conspiracy to restrain trade. Id. The key point, however, was this Court's insistence on case-by-case analysis in any rule of reason

inquiry into the legality of such vertical restraints. Id.

The propriety of case-by-case application of the rule of reason is demonstrated by the Ninth Circuit's decision in Theee Movies of Tarzana v. Pacific Theaters, Inc., 828 F.2d 1395 (9th Cir. 1987), cert. denied, 484 U.S. 1066 (1988), upon which the court of appeals purported to rely in deciding this case. In Theee Movies of Tarzana the Ninth Circuit concluded, after an intensively fact-specific inquiry, that the clearances at issue in that case were reasonable under the circumstances, and thus were not permissible under the rule of reason. Id. at 1400. Unlike the Third Circuit's analysis here, the Ninth Circuit was careful to scrutinize the clearances under the particular circumstances of the case, and did not base its conclusion on per se rules distilled from other rule of reason cases.

In determining that the exclusive clearances in this case do not violate the Sherman Act, the Third Circuit essentially created a per se rule of reasonableness and legality for all clearances granted by film distributors, even if, as in this case, the clearances were actually part of a clandestine agreement entered into between an exhibitor and the dominant distributor of films. In reaching its decision on Orson's antitrust claims, the court of appeals, while paying lip service to the rule of reason, created a virtually insurmountable hurdle for future antitrust plaintiffs claim challenging clearances under the Sherman Act. This misapplication of the rule of reason would ensure that virtually no clearance agreement between a distributor and an exhibitor could be challenged as a violation of the Sherman Act, regardless of the record evidence demonstrating intentionally anticompetitive conduct and anticompetitive effect.

Close scrutiny of the Third Circuit's decision confirms that it virtually insulates clearances from antitrust scrutiny by effectively finding them per se "reasonable." First, the court simply accepted as a matter of fact that because the Roxy and the Ritz were in competition, "the clearances served their accepted purpose of assuring both Miramax and the Ritz that the return from one run of

a particular Miramax film would not be diminished" Appendix at 39a. This assumption disregarded the considerable record evidence showing that instead of fostering the "accepted purpose" of protecting box-office returns, the actual purpose of the secret boycott agreement between the Ritz and Miramax was to eliminate competition for first-run licenses granted by Miramax.

The record was replete with evidence that Miramax and the Ritz engaged in a clandestine agreement to enter into exclusive agreements regarding the exhibition of first-run Miramax art films in Center City Philadelphia, and then to engage in a sham bidding process to foster the illusion that all exhibitors, and especially Orson's Roxy Theater, had an equal opportunity to bid successfully for the Miramax film in question. Facsimile sheets transmitted between Miramax's New York and Los Angeles offices bore date stamps showing that the exclusive agreements between Miramax and the Ritz were entered into before the trade screening for a particular film was even announced to other exhibitors. Later, when the trade screening would occur, exhibitors other than the Ritz were duped into believing that they actually were being offered a genuine opportunity to acquire first-run license rights to the film that Miramax was offering. For example, unbeknownst to exhibitors who arrived at the Ritz on December 8, 1992 for the trade screening of "The Crying Game," Miramax had a week earlier concluded an exclusive license agreement with the Ritz for the first run of that film in Philadelphia. The deceptive character of the trade screening is amplified by the fact that the notice of the trade screening and the invitation to submit bids for "The Crying Game" was sent to exhibitors on December 1, 1992, while the film had actually been licensed exclusively to the Ritz no later than a day earlier. Other examples of such sham bidding were clearly demonstrated in the record.

Miramax and the Ritz thus repeatedly misled other movie exhibitors, and most notably the Roxy, into believing that they actually were competing with one another and with the Ritz to obtain a first-run license for Miramax films when, in fact, the films had

already been secretly licensed to the Ritz for an exclusive first run.[12] Any exhibitor who submitted a bid in response to Miramax's invitation was thus embarking on an exercise in futility.

Significantly, after Miramax realized that its sham trade-screening practices would undergo scrutiny, it removed the invitation to bid from its trade-screening notices, as it did for the notice for "Farewell My Concubine." Nevertheless, Miramax continued to engage in the sham practices. "Farewell My Concubine," for instance, was licensed for an exclusive first run at the Ritz on October 11, 1993, the day before Miramax sent the trade-screening notice to exhibitors and three days before the trade screening was scheduled to occur at the Ritz. Thus, Miramax did not cease its violations, but merely attempted to better conceal its clandestine, anti-competitive agreement with the Ritz.

Moreover, instead of licensing particular films to the Ritz based on Miramax's independent consideration of the terms offered by the Ritz, every Miramax-Ritz license included a pre-ordained set of fixed terms, which had been agreed upon before Miramax announced the availability of particular films. Indeed, under Miramax's conspiracy with the Ritz, Miramax agreed to license every film the Ritz requested, although the Roxy's bids for many of the same films were more economically desirable.

The considerable record evidence presented in this case clearly could have led a factfinder to conclude that the actual purpose of the secret agreement between Miramax and the Ritz, and the resulting clearances granted by Miramax, was not merely to protect box-office returns (which it certainly did, though only incidently), but was part and parcel of a conspiracy to injure competition in the central Philadelphia art-film market and, indeed, to ensure that the Ritz would not face any competition from other exhibitors for licenses to first-run Miramax films. Rather than permitting

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[12] The parties agreed, for the purposes of motions for summary judgment, that the relevant product market is the art-film market and that the relevant geographic market was central Philadelphia.

application of the rule of reason on the basis of record evidence adduced at a trial, however, the court of appeals simply concluded that because the Roxy and the Ritz are in competition, the clearances served their accepted purposes. This, of course, would be true for virtually any clearance granted by a film distributor to an exhibitor. Under the Third Circuit's ruling, such clearances are per se reasonable, no matter how anticompetitive they might be.

The court of appeals next concluded that "the Miramax-Ritz clearances almost certainly reduced intrabrand competition to some degree." Appendix at 40a. The court's observation was an understatement: the record showed that intrabrand competition for any Miramax film for which the Ritz wanted an exclusive license was utterly eliminated. As discussed above, Miramax and the Ritz would foster the illusion of a competitive bidding process for Miramax releases, but the license agreement between Miramax and the Ritz was already a "done deal" by the time that other exhibitors were even notified that they could bid for a first-run license. The result, obviously, was to eliminate intrabrand competition altogether. The court of appeals failed to evaluate the facts of the case as the rule of reason requires, and merely noted that the obvious effect of any clearance granted by a distributor to an exhibitor was to reduce intrabrand competition "to some degree."[13] In this respect as well, the court of appeals effectively cloaked the clearances -- all clearances -- with a per se rule of reasonableness.

Finally, the court of appeals concluded that interbrand competition in the central art-film market was enhanced by the clearances at issue in this case, because the Roxy obtained licenses for the exhibition of art films from companies other than Miramax. Appendix at 40a. This fact, the court concluded, "negates the existence of anti-competitive effects in this case." Appendix at 40a. The court, however, disregarded the unparalleled ability of films

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[13] The court of appeals additionally misidentified the relevant consumers in the central Philadelphia art-film market as moviegoers. The relevant consumers are in fact the exhibitors who vie for first-run licenses to Miramax films.

distributed by Miramax to generate sufficient revenues for an art-film exhibitor to compete in the relevant market. Without the ability to compete with the Ritz for Miramax releases, the Roxy was financially crippled, and ultimately was driven out of business. The mere existence of other art films fails to take into account Miramax's market dominance in the art-film industry, and the fact that films marketed by other companies, even taken as a whole, could not financially sustain the Roxy in the face of its inability to exhibit Miramax films. As noted above, the Ritz obtained every first-run license that it sought from Miramax, in advance of Miramax's even soliciting bids from other exhibitors. Again, despite the record evidence, the court of appeals effectively concluded as a matter of law that clearances enhance interbrand competition, without engaging in the case-by-case analysis required by the rule of reason.

The court of appeals' conclusion that motion picture clearances are per se reasonable conflicts with every rule of reason case in this Court since Paramount Pictures. Moreover, the Third Circuit's conclusion that exclusive copyright licenses for first-run films are per se reasonable will have implications beyond the traditional motion picture business, and may well have a distorting, anticompetitive impact on the distribution of video tapes and other recordings of motion pictures, the exhibition of motion pictures on broadcast or cable television, and the exhibition of movies on pay-per-view outlets in residences and hotels. This Court should accept review of the Third Circuit's ruling and bring it into line with settled antitrust jurisprudence.

CONCLUSION

The implications of the Third Circuit's decision reach beyond competition between art-film theaters. If permitted to stand, the decision would concentrate even more market power in dominant 10-screen and 12-screen "multiplex" theaters, by practically guaranteeing their ability to exclude small independent exhibitors from the first-run movie business. And, as noted above, the Third Circuit's expansive reading of the copyright licensing privilege

promises to infect other existing and emerging lines of commerce as well. This Court should take this opportunity to review the matter.

For all the foregoing reasons, Petitioner respectfully requests that this Court grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ORSON INC., Plaintiff,	)	
v.	)	No. 93-cv-4145
MIRAMAX FILM CORPORATION, Defendant.	)	

MEMORANDUM AND ORDER

Joyner, J. October 5, 1994

This antitrust matter has been brought before the Court by motion of the plaintiff, Orson, which is seeking an order granting it partial summary judgment. The defendant, Miramax Film Corporation (Miramax), has countered with its own motion seeking an award of summary judgment on all counts of Orson's complaint. For the reasons that follow, Orson's Motion for partial summary judgment is denied, while Miramax's motion for summary judgment is granted in part and denied in part.

I. HISTORY OF THE CASE

A. The Principals

Orson is a Pennsylvania corporation that owns and operates the Roxy Screening Rooms, a movie house in Center City Philadelphia. The Roxy operates two screens, each with a seating capacity of 137 persons; and it displays so-called "art films," those films that are viewed as alternatives to mainstream Hollywood fare.[1] The Roxy competes with the Ritz theaters for the patronage of art-film goers in Center City Philadelphia. The Ritz theaters consist of two separate facilities: the "Ritz Five Theaters," which is owned and operated by the Posel Corporation, and the "Ritz at the Bourse,"

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[1] Recent films of this discrete genre include "The Crying Game," Strictly Ballroom," Like Water for Chocolate," and "Enchanted April."

which is owned and operated by the Raysid Corporation. The president of both corporations is Ramon L. Posel, who owns one-half of the outstanding shares of each company. Mr. Posel's brother owns the remaining fifty per cent of each corporation. The Ritz theaters each has five screens and seating capacities ranging from 155 to 375 persons.

Both the Ritz and Roxy exhibit films distributed by Miramax, a New York corporation that leases feature films, including art films, to movie theaters nationwide. Between January 1992 and February 1994, Miramax leased to the Ritz 29 films on a first-run basis and one film on a subsequent-run basis. Orson alleges in its amended complaint that Miramax and the Ritz enjoy an agreement whereby the Ritz exhibits Miramax films only as long as Miramax grants it an exclusive license for each film. As a result of the agreement, no Miramax film plays contemporaneously at both the Ritz and the Roxy.

B. The Amended Complaint

The amended complaint contains three counts. Counts I and II allege that Miramax's arrangement with the Ritz violates both section one of the Sherman Act[2] and Pennsylvania common law regarding unreasonable restraints of trade.[3] To support its contention, Orson states that it has been unable to secure the right to exhibit Miramax art films on a first-run basis. It claims that Miramax has consistently refused to grant a license to the Roxy, even though the Roxy has offered both to pay a higher percentage of the box office receipts and to exhibit the films on a non-exclusive basis. As for the one film for which Miramax granted a first-run license to the Roxy,

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[2] The Sherman Act provides that

> [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1 (1994).

[3] The parties agree that Pennsylvania common law follows federal antitrust law as embodies in the Sherman Act. See Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187, 339 Pa. 353, 14 A.2d 438 (1940). Thus, Counts I and II of the amended complaint will be treated identically.

"Benefit of the Doubt" starring Donald Sutherland and Amy Irving, Orson claims that Miramax distributed the film, knowing that it would be a box office failure, for the purpose of providing it with a post hoc justification for excluding the Roxy from competition with the Ritz. The result of the arrangement between Miramax and the Ritz, alleges Orson, has been to eliminate competition in the art film market, forcing the art film-goer to pay monopoly prices at the Ritz.

Count III alleges that Miramax has violated Pennsylvania's Feature Motion Picture Fair Business Practices Law, 73 Pa. Cons. Stat. Ann. §§ 203-1--203-11 (1993) (the Pennsylvania Act). Three specific provisions are at issue. First, Orson contends that Miramax has violated section 203-7, the length of run provision, which prohibits a distributor from granting an exclusive first run to an exhibitor for more than 42 days. The amended complaint specifically details instances in which Miramax films played at the Ritz on a first run basis for more than 42 days.

Second, Orson argues that Miramax has violated section 203-4, the blind bidding provision, which provides that before a distributor and an exhibitor either engage in negotiations or conclude an agreement, the distributor must conduct a trade screening. The facts supporting this allegation are not specifically set forth in the amended complaint, but instead are enumerated in Orson's motion for partial summary judgment. There, Orson contends that Miramax has on numerous occasions, concluding licensing agreements with the Ritz prior to the trade screenings. Finally, Orson contends that Miramax has violated section 203-8, which sets forth the bidding procedures that exhibitors and distributors must follow if a distributor solicits bids for the licensing of the distributor's films. Again, the facts underlying this charge are largely set forth in Orson's motion for partial summary judgment rather than in the amended complaint.

C. The Motions

Orson has filed a motion for summary judgment as to its allegations under the Pennsylvania Act. Miramax has countered with its own motion for summary judgment on all counts of the plaintiff's amended complaint. In its brief in opposition to Miramax's summary judgment motion, Orson argues that the Miramax-Ritz agreement should be declared illegal per se under our antitrust laws. The courts are authorized to make such a declaration if the challenged restraint

"*facially* appears to be one that would always or almost always tend to restrict competition and decrease output." Broadcast Music, Inc. v. Columbia Broadcasting, 441 U.S. 1, 19-20 (1979).

Since the determination of whether a certain business practice is illegal per se is made at the summary judgment stage, see id. at 6; Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958), the Court will treat Orson's contention as to the per se illegality of the Miramax-Ritz agreement as a request for summary judgment on its antitrust claim. Thus, the Court will approach this matter as though it had before it cross-motions for summary judgment as to Orson's entire amended complaint.

II. DISCUSSION

A. The Summary Judgment Standard

This Court is authorized to award summary judgment "if the pleadings, depositions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). Thus, the Court's responsibility is not to resolve disputed issues if fact, but to determine whether there exist any factual issues to be tried. Anderson v. Liberty Lobby, 477 U.S. 242, 247-49 (1986). The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989) (citing Liberty Lobby, 477 U.S. at 249). Further, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Boiled to its essence, te summary judgment standard requires the non-moving party to create a "sufficient disagreement to require a submission [of the evidence] to a jury." Liberty Lobby, 477 U.S. at 251-52.

In cases where the parties have filed cross motions for summary judgment, as the parties have in the present action, each side contends that no issues of material fact exist. Yet the standard under which the Court weighs the merits of the motions does not change simply because cross-motions have been filed. United States v. Hall, 730 F. Supp. 646, 648 (M.D. Pa. 1990). Each party must establish that no issues of fact exist and that it is entitled to judgment

as a matter of law. As a result, a case will not necessarily be decided at the summary judgment stage merely because cross-motions have been filed. Id. (citing Rains v. Cascade Indus., 402 F.2d 241, 245 (3d Cir. 1968)). If an issue of fact exists, both summary judgment motions will fail. With these principles in mind, the Court turns to the substance of the motions.

B. The Antitrust Claim

Orson's amended complaint alleges that Miramax and the Ritz theaters continue to engage in a concerted refusal to deal with the Roxy. This alleged refusal to deal has resulted not only in the Roxy's exclusion from the art film market, but also in the Ritz's realization of monopoly power. The United States Court of Appeals for the Third Circuit has identified the four elements a plaintiff must demonstrate to prove a Sherman Act violation: (1) an agreement or combination, (2) the produced anti-competitive effects within the relevant product and market, (3) that the conspiracy was illegal, and (4) that the conspiracy was the proximate cause of the plaintiff's harm. J.F. Feeser, Inc. v. Serv-a-Portion, Inc., 909 F.2d 1524, 1541 (1990), cert. denied, 449 U.S. 921 (1991) (citations omitted).

For purposes of its motion for summary judgment on the antitrust claim, Miramax concedes that there exists an agreement pursuant to which Miramax refuses to deal with the Roxy, but it maintains that Orson cannot, as a matter of law, demonstrate the second and third elements of the Feeser test. Accordingly, Miramax contends that it is entitled to summary judgment on two grounds: (1) because the antitrust laws do not prohibit the Miramax-Ritz agreement; and (2) because Orson has failed to demonstrate any harm to competition as a result of the agreement. Because the court finds that the Miramax-Ritz agreement does not run afoul of our antitrust laws, Miramax's motion for summary judgment on the antitrust issue is granted.

1. Whether the Miramax-Ritz Agreement is Illegal per se

Because almost all business agreements and contracts restrain trade to some degree, section 1 of the Sherman Act has construed to make illegally only those contracts and combinations that constitute an unreasonable restraint of trade. Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723

(1988); (citing National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85, 98 (1984)). Whether a business arrangement constitutes an unreasonable restraint of trade is normally determined by applying, on a case-by-case basis, a rue of reason, which considers all relevant factors in examining both the defendants' purpose in implementing the restraint and the restraint's effect on competition. See Board of Trade of Chicago v. United States, 246 U.S. 231, 244 (1918).

The Supreme Court, however, has recognized that the courts have acquired a sufficient level of familiarity with certain categories of restraints. As a result, these more notorious restraints may be declared illegal per se at the summary judgment stage, eliminating the need for a detailed rule of reason inquiry at trial. These classes of cases include, among others, vertical, price-fixing restraints, see Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911);[4] horizontal price-fixing agreements, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940);[5] and group boycotts, see Klor's, Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207 (1959).[6] By contrast, the Supreme Court has elected not to extend the per se rue to vertical non-price restraints. See Continental T.V., Inc. v. GTE

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[4] The term "vertical restraint" describes an agreement between two or more companies on different levels in the chain of product distribution. In Dr. Miles, for example, the challenged restraint was an agreement between a drug manufacturer and wholesale dealers to fix resale prices at both the wholesale and retail levels. Dr. Miles, 220 U.S. at 374. Since the Court determined that such arrangements had "for their sole purpose the destruction of competition and the fixing of prices, " it declared them illegal per se. Id. at 408.

[5] The term "horizontal restraint" connotes an agreement among competitors on the same level of the product distribution chain. The challenged restraint in Socony-Vacuum involved an agreement among oil companies to fix prices at an artificially high level. The Court concluded that any "combination formed for the purpose and the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." Socony-Vacuum, 310 U.S. at 223.

[6] In Klor's, the Court was confronted by a "group boycott," in which a number of manufacturers and distributors conspired to exclude a retailer from the market. The Court held that such agreements were illegal per se, even absent a specific agreement to fix price. Klor's, 359 U.S. at 212.

Sylvania, Inc., 433 U.S. 36 (1977).[7] In justifying its decision, the GTE Sylvania Court noted that while vertical price restraints often suppress both interbrand and intrabrand competition,[8] vertical non-price restraints were likely to enhance interbrand competition, "the primary concern of antitrust law." Id. at 51-52 &nn.18 & 19.[9]

In light of this precedent, this Court's task is to first classify the restraint at issue before deciding whether the restraint is per se violative of the Sherman Act. Orson first argues that the Miramax-Ritz agreement constitutes a group boycott of the type declared illegal un United States v. General Motors Corp., 384 U.S. 127 (1966), and Klor's. In Klor's, the Supreme Court held that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be [illegal per se]." Klor's, 359 U.S. at 212. And in General Motors, the Court held that the joint action of dealers to eliminate competitors was likewise illegal. General Motors, 384 U.S. at 140. Thus, because both Klor's and General Motors involved

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[7] A "vertical non-price restraint" is an agreement between a manufacturer and a retailer that does not specifically concern price. In GTE Sylvania, a television manufacturer entered into franchise agreements that prohibited the sale of its product from other than specified locations. Thus, pursuant to the agreement, a retailer was permitted to sell Sylvania televisions from its San Francisco outlet, but not from an outlet in Sacremento. GTE Sylvania, 433 U.S. at 39-40. The Court held that because of the complexity of vertical non-price restraints and the likelihood that vertical agreements often enhance competition, such agreements were to be evaluated under a rule of reason standard. Id. at 58-59.

[8] In the context of instant dispute, "interbrand competition" refers to competition among film distributors in the art film market. "Intrabrand competition," on the other hand, refers competition among exhibitors of individual art films. The relief that Orson seeks in this case, a declaration that the exclusive runs at the Ritz are illegal, would serve to foster intrabrand competition: Orson wants the opportunity to exhibit films like "The Crying Game" in direct competition with the Ritz. Interbrand competition would be better served if the relief Orson seeks is denied, however, since a greater number of distributors and films would enjoy access to the Center City Philadelphia market.

[9] By utilizing vertical non-price restraints, a manufacturer can induce a retailer to provide informational services about a product, repair services, as well as promotional services. Further, vertical non-price restraints work to counteract the so-called "free-rider" effect. GTE Sylvania, 433 U.S. at 55.

a horizontally-imposed boycott, and not the vertical combination at issue here, neither holding compels the Court to declare the Miramax-Ritz agreement illegal per se.

In a rather transparent attempt to bring this case within the scope of the per se rule, Orson argues, in its surreply in opposition to Miramax's summary judgment motion, that a horizontal group boycott exists between the Posel Corporation, owner of the Ritz, and the Raysid Corporation, owner of the Ritz at the Bourse. The tragic flaw in this eleventh hour argument is that, throughout the course of this litigation, Orson has treated the Ritz theaters as a single entity. For example, Orson asserted in its motion for partial summary judgment that Ramon L. Posel is the principal and president and of both companies, that he books all of the films exhibited at both theaters, and he "runs both theaters as a single facility." Plaintiff's Memorandum in Support of its Motion for Partial Summary Judgment at 4. Later, at page 18, Orson conceded that both Ritz facilities are embodied in one person: "Ramon Posel, who is the Ritz." Despite Orson's artful argument, it is clear that no Sherman Act conspiracy can result from the doings of a single man.

In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent and its wholly owned subsidiary must be considered as a single enterprise for section one puposes. Id. 771. Although the Court limited its holding to the situation involving a parent and its wholly-owned subsidiary, the principles that guided the Copperweld decision are even more compelling here: "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." Id. Because the Ritz theaters share common owners and leadership and operate as a single entity, we hold that there can be no Sherman Act conspiracy between them.

Orson's final argument for a favorable resolution at the summary judgment stage is found in Third Circuit precedent suggesting that a per se rule applies to vertical restraints that adversely impact competition at the horizontal level. In Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979), the Third Circuit held that a manufacturer's refusal to deal with a distributor

who resold the product for a price less than the price offered by other distributors may constitute a per se violation of section one. Id. at 170. The court's holding was based on both the price-fixing element of the restraint and the restraint's horizontal impact. Id. In Sharp, however, the Supreme Court sharply curtailed the breadth of the Cernuto decision, holding that a vertical restraint would be subject to per se disposition only if it entailed an express or implied agreement to set resale prices. Sharp, 485 U.S. at 735-36. The Sharp Court expressly noted that the agreement, and not its effects, is the determining factor in deciding whether a restraint is properly characterized as horizontal: "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." Sharp, 485 U.S. at 730 n.4.

Although the restraint at issue may have some effect on a horizontal level, it is clearly a vertical agreement between a distributor and an exhibitor, and therefore the holding in Sharp precludes the Court from applying the rule in Klor's as to the illegality of a horizontally-imposed boycott. Further, the facts here do not fit into the narrow class of cases imposing per se liability on vertical restraints that concern resale price terms. Accordingly, we hold that the agreement between Miramax and the Ritz does not violate the Sherman Act per se.

2. The Reasonableness of the Restraint

Having rejected Orson's bid for summary judgment under the Sherman Act, the Court now turns to Mirmax's motion for summary judgment and asks whether, after an analysis of the facts on the record under the rule of reason, Miramax must prevail as a matter of law. Thus, the issue here concerns the reasonableness of the Miramax-Ritz agreement, by which Miramax grants exlcusive licenses to the Ritz for the exhibition of its art films. Miramax argues that the exclusive licenses are reasonable, and therefore lawful. Orson counters that the agreement is illogical from a business perspective, and as such, it reveals Miramax's true intention in entering into the agreement: to harm the Roxy's competitive position.

The United States Court of Appeals for the Ninth Circuit addressed the antitrust implications of an exclusive license in Three Movies of Tarzana v. pacific Theaters, 828 F.2d 1395 (9th Cir. 1987),

cert denied, 484 U.S. 1066 (1988). In that case, the owner of a movie theater brought suit against a competing film exhibitor and various film distributors, alleging that the distributors and the rival theater collaborated to provide the rival theater with "clearance"[10] over the plaintiff's theater. The plaintiff alleged, as Orson does here, that the granting of exclusive licenses eliminated competition in the relevant market and caused harm to the plaintiff. Id. at 1397. The Ninth Circuit concluded, as this Court has today, that movie clearances are vertical non-price restraints subject to a rule of reason analysis. Id. at 1398.

In determining the reasonableness of a vertical non-price restraint of trade, the Ninth Circuit and other courts have undertaken an analysis that is mindful of the Supreme Court's admonition that interbrand competition is the "primary concern of antitrust law." GTE Sylvania, 433 U.S. at 52 n.19. Thus, the courts have concluded that vertical non-price restraints are more likely to be lawful if they promote interbrand competition without unduly restricting intrabrand competition. See Sharp, 485 U.S. at 724; Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 190 (2d Cir. 1992); Three Movies, 828 F.2d at 1399. Further, with respect to the specific issue of clearances, the courts have noted that clearances are reasonable vertical restraints of trade in circumstances where "the theaters are in substantial competition, and the clearances are used to assure the exhibitor that the distributor will not license a competitor to show the movie at the same time or so soon thereafter that the exhibitor's expected income will be greatly diminished." Three Movies, 828 F.2d at 1399. (citing United States v. Paramount Pictures, 334 U.S. 131, 145-46 (1948)).

Applying these principles to the challenged restraint, this Court holds that the clearances at issue here are reasonable. First while the clearances stifle intrabrand competition to a small degree -- no Miramax art film playing at the Ritz can contemporaneously at the Roxy, the clearances serve to stimulate competition between art films

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[10] "Clearance," in a film industry parlance, refers to the exclusivity of the license. Thus, if one theater has clearance for a certain film, a distributor may not grant a license to another theater in a given geographical area while the film is playing.

distributed by Miramax and art films originating with other distributors. As a result, art film-goers in Center City Philadelphia are offered a wider array of selections from which to choose. Further, it is apparent that the Ritz and the Roxy are in substantial competition. By Orson's own admission, the Ritz and the Roxy are the only two art houses in Center City Philadelphia. Thus, if the Ritz and the Roxy were to exhibit the same film on the same dates, not only would the overall degree of choice be reduced, but the Ritz would assuredly lose income as a result. At its core, Orson's complaint asks the Court to compel Miramax to lease its films to Orson for exhibition at the Roxy. The antitrust laws were not enacted to achieve such ends. Accordingly, the Court grants Miramax's motion for summary judgment on Counts I and II of Orson's complaint.

C. Claims under the Pennsylvania Act

1. Section 207-1

Orson alleges in its amended complaint that Miramax has operated in violation of section 207-1 of the Pennsylvania Act, which provides as follows:

> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theaters within the geographical are and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theaters that would normally be served on subsequent run availability.

73 Pa. Cons. Stat. Ann. § 203-7 (1993). The evidence on the record demonstrates that 15 Miramax films were exhibited at the Ritz for a period in excess of 42 consecutive days.[11] The record further

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[11] These films include "Double Lives of Veronique," "Hear My Song," "Mediterraneo," "Delicatessen," "Zentropa," "Enchanted April," "Resevoir Dogs," "The Crying Game," "Passion Fish," "Strictly Ballroom," "Like Water for Chocolate," "Ethan Frome," "Map of the Human Heart," "Farewell My Concubine," and "The Piano."

indicates that 9 of the films "expanded" to other Philadelphia area theaters, outside of Center City Philadelphia, before the 42 day period expired, while the remaining 6 films ran at the Ritz without expanding to other area theaters.

a. Agreement of Exclusivity

In order to bring a successful action against Miramax for a violation of this provision, therefore, Orson must show, at the outset, the existence of an agreement of exclusivity. Miramax urges the Court to interpret the statute such that Orson must show that Miramax agreed to grant the Ritz an exclusive license for a period exceeding 42 days. In other words, Miramax would have it that the exhibitor and distributor must agree, at the time of the execution of the contract, that the period of exclusivity would exceed 42 days. Such an interpretation, however, would allow a distributor and exhibitor to circumvent that statute simply by failing to specify a specific date on which te exclusivity of the license would expire. As the Third Circuit has noted, "the [Pennsylvania] Act requires that the exclusive first run must be expanded after 42 days." Associated Film Distribution Corp. v. Thornburgh, 800 F.2d 369, 377 (3d Cir. 19860, cert denied, 480 U.S. 933 (1987). thus, the Court holds, for purposes of section 203-7, that there is an unlawful agreement of exclusivity as long the distributor grants an exclusive license to the exhibitor, and the license remains exclusive for a period exceeding 42 days.

The statute further provides that in order to trigger 203-7 liability, the license must be exclusive to a certain "geographical area." Miramax argues it complied with the statute when it expanded to other theaters in the area, because the relevant geographical area in the instant case is the greater Philadelphia metropolitan area. By contrast, Orson contends that the expansions were legally irrelevant, because the relevant geographical area is limited to Center City Philadelphia. Orson reads the statute as follows: if an exclusive license is granted that provides an exhibitor with clearance in a given geographical area, then the distributor must expand the run to second run theaters located within the geographical area covered by the clearance within 42 days.

The statute's wording is sufficiently vague to permit both readings. As a result, the Court must wade into the murky waters of the provision's legislative purpose in order to settle this issue. The

Court first notes that the Pennsylvania Act identifies as one of its purposes to "promote the wide geographical dissemination at reasonable prices to the public of ideas, opinions and artistic expression in feature motion pictures." 73 Pa. Cons. Stat. Ann. § 203-2(4) (1993). Further, in Associated Film Distribution Corp. v. Thornburgh, 614 F. Supp. 1100 (E.D. Pa. 1985), Judge Katz recognized that "[t]he purpose of the provision is to promote the wider dissemination of films in the Commonwealth." Id. at 1112. Judge Katz further noted that as a result of the provision, "[s]ome films have opened in suburban and rural areas more quickly." Id. While another identified purpose of the Pennsylvania Act is to "foster vigorous and healthy competition" in the film business, § 203-2(3), this Court concludes that the legislature's primary purpose in enacting section 203-7 was not to increase market rivalry among direct competitors, but instead to promote the wide distribution of movies throughout Pennsylvania.

Accordingly, Miramax can incur no 203-7 liability for the 9 films that were expanded to other Philadelphia area theaters on or before the forty-third day of their runs at the Ritz.[12] With respect to the 6 films that did not expand to other theaters, however, we conclude that an issue of fact has been raised as to both the existence and the terms of the Miramax-Ritz agreement. We further hold there is sufficient, though not uncontradicted evidence suggesting that an agreement between Miramax and the Ritz existed pursuant to which Miramax granted t the Ritz exclusive licenses covering the Center City Philadelphia. Further, in 6 instances, the film was not expanded to other theaters within 42 days after te film opened at the Ritz, and the Ritz's license remained exclusive. These circumstances, if proved, comprise a 2-307 violation. Since these facts are in dispute summary judgment would be unwarranted.

b. Willful and Intentional Violation

Further militating against an award of summary judgment in section 203-10, which provides that "[a]ny exhibitor may bring an action against a distributor or exhibitor or both in the respective court

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[12] These 9 films include "Hear My Song," "Enchanted April," Reservoir Dogs," "The Crying Game," "Map of the Human Heart," "Strictly Ballroom," "Ethan Frome," "Farewell My Concubine," and "The Piano."

of common pleas wherein the exhibitor's business is located to recover damages sustained by a willful and intentional violation of [t]his act...." 73 Pa. Cons. Stat. Ann. § 203-10 (1993). Thus, in order for Orson to prevail on any of its claims arising under the Pennsylvania Act, but also that any violation by Miramax was "willful and intentional." First, we note that a triable issue of fact exists as to whether Orson incurred a damage as a result of the agreement between Miramax and the Ritz. There is sufficient evidence from which a jury could infer that Orson was damaged by Miramax's unwillingness to expand any of the 6 films to other theaters in Center City Philadelphia.

Further, we find that there is a genuine issue of fact as to whether, should Orson be able to demonstrate some violation of the Pennsylvania Act on Miramax's part, the Act was violated wilfully and intentionally. This Court notes that summary judgment is rarely awarded in cases in which intent or purpose is at issue. Liberty Lobby, 477 U.S. at 255; Coolspring Stone Supply v. American States Life Ins. Co., 10 F.3d 144, 148 (3d Cir. 1993); Riehl v. Traveler's Ins. Co., 772 F.2d 19, 24 (3d Cir. 1985) ("issues of knowledge and intent are particularly inappropriate for resolution by summary judgment, since such issues must often be resolved on the basis of inferences drawn from the conduct of parties"). Accordingly, the parties' cross-motions for summary judgment on Orson's 203-7 claim are both denied.

2. Sections 203-4 and 203-8

Orson also contends that it has been damaed as a result if Miramax's alleged violations of sections 203-4 and 203-8. Section 203-4 sets forth the trade screening requirement, providing as follows:

> Blind bidding is hereby prohibited within the Commonwealth. No negotiations between exhibitors and distributors for the licensing or exhibition of a feature motion picture shall take place and no license agreement or any of its terms shall be agreed to for the exhibition of any feature motion picture within the Commonwealth before the feature motion picture has been trade screened within the Commonwealth.

73 Pa. Cons. Stat. Ann. § 203-4 (1993). The Act defines a trade screening as "[t]he showing of a feature motion picture by a distributor in recognized exchange cities within the Commonwealth which is open to any exhibitor." § 203-3.

Section 203-8, which sets forth bidding procedures, provides, in pertinent part, as follows:

> (a) Invitation to bid contents.--If bids are solicited from exhibitors for the licensing of a feature motion picture within the Commonwealth, then the invitation to bid shall specify the following:
>
> > (1) Whether the run for which the bid is being solicited from exhibitors is a first, second or subsequent run; whether the run is an exclusive or nonexclusive run; and the geographical area for the run.
> >
> > (2) The names of all exhibitors who are being solicited.
> >
> > (3) The date and the hour the invitation to bid expires.
> >
> > (4) the time, date, name and address of the location where the bids will be opened, which location shall be in the exchange centers of this Commonwealth.
>
> * * *
>
> (c) Bid submission and opening.–All bids shall be submitted in writing and shall be opened at the same time and in the presence of those exhibitors, or their agents, who submitted bids and are present at such time.

73 Pa. Cons. Stat. Ann. § 203-8 (1993). The Pennsylvania Act defines an "invitation to bid" as "[a] written or oral solicitation or invitation by a distributor to one or more exhibitors to bid or negotiate for the right to exhibit a feature motion picture." § 203-3. Orson contends that Miramax violated the blind bidding provision repeatedly by entering into negotiations and reaching licensing agreements for its films prior to the trade screenings. Further, Orson argues that Miramax failed to comply with the Pennsylvania Act's bidding procedures.

Miramax raises a procedural objection to Orson's 203-4 and

203-8 claims. It argues that claims should be rejected because they were not properly identified in the amended complaint as the grounds upon which Orson claimed an entitlement to relief. This issue centers on Count III of the amended complaint, which lays out the factual predicate for Orson's 203-7 claim, but fails to d the same for the 203-4 and 203-8 claims. On the other hand, the amended complaint asserts an entitlement to relief under the Pennsylvania Act in toto, and not just under 203-7.[11]

Pursuant to the Federal Rules of Civil Procedure, a complaint is sufficient as long as it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Our Court has held that in order for a plaintiff to properly state a claim, it must set forth "'the aggregate of operative facts which give rise to a right enforceable in the courts.'" Smith, Klein & French Laboratories v. A.H. Robins Co., 61 F.R.D. 24, 28 (E.D. Pa. 1973) (quoting Original Ballet Russe, Ltd. v. Ballet Theater, Inc., 133 F.2d 187 (2d Cir. 1943)). Thus, the test for the sufficiency of a complaint requires the plaintiff to set forth a set of facts that serves to put the defendants on notice as to the nature and basis for the

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[11] Count III of the amended complaint reads in full as follows:

COUNT III

VIOLATION OF PENNSYLVANIA FEATURE MOTION PICTURE FAIR BUSINESS PRACTICES LAW

41. The allegations set forth in paragraph 1-40 above are incorporated herein by reference.

42. Miramax has consistently granted the Ritz licenses for its feature art films for exclusive first runs for more than 42 days, and, as a consequence, refused to license such films to plaintiff, or any other exhibitors in the Philadelphia area served by the Ritz and Roxy theaters. Examples of such excessive exclusive first runs at the Ritz are "The Crying Game (10 weeks exclusivity), "Like Water for Chocolate" (over four months exclusivity), and "Strictly Ballroom" (15 weeks exclusivity).

43. Miramax'[s] refusal to license plaintiff in order to honor a license to the Ritz for first-run exclusivity in excess of 42 days is in violation of the Pennsylvania Feature Motion Picture Fair Business Practices Law, 73 P.S. Section 203-1 et seq. (the "Act").

44. Miramax'[s] violation was -- and continues to be -- willful and intentional.

45. Plaintiff has suffered damages as a direct and proximate result of defendant's willful and intentional violation of the Act.

claim. Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993); see Hicks v. Arthur, 843 F. Supp. 949, 959 (E.D. Pa. 1994) (complaint "must be sufficient enough to enable the court to make out the potential viable legal theories upon which the complaint is based"). Accordingly, the Court must determine whether the Orson's complaint effectively afforded Miramax with sufficient notice as to the 203-4 and 203-8 claims.

Applying these principles to the instant matter, the Court finds that Orson's amended complaint is legally insufficient as to the 203-4 and 203-8 claims. While Count III of the complaint asserts an entitlement to relief generally under the Pennsylvania Act, and is not limited to relief under the length of run provision, the amended complaint is devoid of any factual basis for the 203-4 and 203-8 claims. The only factual allegation included specifically in Count III concerns the alleged violation of the length run provision. And while the facts alleged throughout the amended complaint were incorporated by reference into Count III, the court finds that the allegations contained in the amended complaint as a whole did not serve to provide Miramax with notice that Orson planned to proceed under sections 203-4 and 203-8. Fairness dictates that Miramax be given the opportunity to conduct discovery with knowledge of the facts upon which Orson intends to proceed. The amended complaint offers no inkling that Orson will assert an entitlement to relief under 203-4 and 203-8. Because Orson's amended complaint failed to provide Miramax with notice of either the factual basis for the claims under 203-4 and 203-8 or the specific provisions under which Orson intends to proceed, Miramax's motion for summary judgment as to those provisions is granted. Orson will be granted leave to amend its complaint to include claims under sections 203-4 and 203-8, it is so chooses.

III. CONCLUSION

For the reasons enumerated above, Orson's motion for partial summary judgment is denied. Miramax's motion for summary judgment is granted with respect to the federal and state antitrust claims as well as the claims under Pa. Cons. Stat. Ann. §§ 203-4 and 203-8, but denied with respect to the claim under Pa. Cons. Stat. Ann. §§ 203-7. Orson is granted leave to amend its complaint to add the claims under sections 203-4 and 203-8. An appropriate order

follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ORSON INC., Plaintiff,	)	
v.	)	No. 93-cv-4145
MIRAMAX FILM CORPORATION, Defendant.	)	

ORDER

AND NOW, this 5th day of October, 1994, upon consideration of the Plaintiff's Motion for Partial Summary Judgment and the Defendant's Motion for Summary Judgment, it is hereby ordered, for the reason's set forth in the preceding memorandum, that the Plaintiff's Motion for Partial Summary Judgment is DENIED, the Defendant's Motion for Summary Judgment is GRANTED with respect to the state and federal antitrust claims, the Defendant's Motion for Summary Judgment is GRANTED with respect to and the claims under 73 Pa. Cons. Stat. §§ 203-4 and 203-8, and the Defendant's Motion for Summary Judgment is DENIED with respect to the claims under Pa. Cons. Stat. § 203-7. the Plaintiff is granted leave to amend its complaint.

BY THE COURT:

s/ J. Curtis Joyner

J. Curtis Joyner, J.

Filed April 1, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

95-1399

ORSON, INC.
t/a ROXY SCREENING ROOMS

v.

MIRAMAX FILM CORP.
Orson, Inc. d/b/a Roxy Screening Rooms,
Appellant

Appeal from the United States District Court
For the Eastern District of Pennsylvania
D.C. Civ. No. 93-cv-04145

Argued
January 22, 1996
Before: MANSMANN and LEWIS, *Circuit Judges* and
RESTANI, *Judge*, Court of International Trade.*
(Filed April 1, 1996)

*Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

This antitrust case arises out of a business arrangement in the motion picture industry. The plaintiff, Orson, Inc., the owner of the Roxy Screening Rooms, a movie theater, alleged that the defendant, Miramax Film Corporation, a film distributor, violated section 1 of the Sherman Act, 15 U.S.C. § 1, and Pennsylvania common law by conspiring with another theater to drive the Roxy out of business and by granting that other theater exclusive, first-run licenses on Miramax films. Orson also charged that the licenses violated the length-of-run provision of Pennsylvania's Feature Motion Picture Fair Business Practices Law, 73 P.S. §203-7. Orson now appeals the district court's decision to grant Miramax's motion for summary judgment.

We hold that Orson failed to present evidence sufficient, to show that Miramax engaged in an antitrust conspiracy or that the

licenses were unreasonable restraints of trade.

We further hold that the district court erred in interpreting 73 P.S. §203-7's requirement concerning the geographic expansion of first-run films. Thus, we will affirm the judgment of the district court granting summary judgment to Miramax on Orson's antitrust claims. We will, however, vacate the district court's grant of summary judgment to Miramax on Orson's state statutory claim and remand for further proceedings.

I. [1]

In January of 1992, Orson assumed the operations of the Roxy, a movie theater located in downtown "Center City" Philadelphia. The Roxy exhibited "art films," as opposed to movies that may be characterized as "commercial" or "mainstream," on two screens, each with a 130 person seating capacity. The Roxy charged between $3.50 and $5.50 for tickets.

The Ritz theaters, consisting of two separate five-screen facilities, the Ritz Five Theaters and the Ritz at the Bourse (collectively, the "Ritz"), also exhibited art films in Center City. The Ritz Five Theater, which opened in 1976 with about 1,125 seats, was owned and operated by the Posel Corporation; the Ritz at the Bourse, opened in 1990 with approximately 710 seats, was owned and operated by the Raysid Corporation. Ramon L. Posel was the President of both corporations. The Ritz's admission prices typically ranged from $3.50 to $6.00.

In addition to the Roxy and the Ritz, there were six other theaters in Center City; four theaters with a total of 20 screens were operated by United Artists and two theaters with two screens each were operated by American Multi-Cinema.

Miramax, a nationwide distributor of feature-length motion pictures, including art films, distributed movies to all of the theaters located in Center City and to theaters in the greater metropolitan Philadelphia area.

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[1] We begin our analysis by reviewing the evidence presented in this case. In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations, and must view the facts and inferences in the light most favorable to the party opposing the motion. *Big Apple BMW, Inc. v. BMW North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993).

In the motion picture industry, film distributors license films to theaters for exhibition for a given amount of time. Frequently, the license is exclusive, providing that during its duration, the film will not be licensed to other exhibitors in a prescribed area. Such licenses are called "clearances."

In the usual case, films are licensed for a sum which consists of a film rental amount and a house allowance. Under this system, the distributor and the exhibitor agree on a separate dollar amount which represents the exhibitor's weekly expenses. The exhibitor retains a percentage of the weekly gross from ticket receipts above the house expense allowance; the remaining percentage inures to the distributor. Typically, the license provides that the distributor will receive a minimum percentage of the exhibiting theater's box office gross. A film distributor's revenues, therefore, depend directly upon a theater's capacity to attract the public. Thus, the decision to license a movie to one theater or another is premised in considerable measure on a distributor's assessment of a theater's grossing ability.

The time a particular exhibitor is licensed to show a film is called the "run." A "first-run" is the first exhibition of a film in a given geographic area; "subsequent" runs are exhibitions of that film in the area after the first-run has expired. Successive runs of motion pictures are a practical necessity in the industry because commonly, there are a limited number of prints made of any one film.

Between January of 1992, when Orson began operating the Roxy, and February of 1994, the close of discovery, Miramax licensed about 28 films on a first-run basis and one film on a subsequent-run basis to the Ritz. By comparison, during this period, Miramax licensed one film on a first-run basis and approximately 14 films on a subsequent-run basis to the Roxy. Miramax also granted eight first-run licenses to the theaters in Center City Operated by either United Artists or American Multi-Cinema[2] and six first-run licenses to theaters in the suburbs of Philadelphia.

At this same time, a number of other distributors also licensed films to the exhibitors in Center City. From the Roxy's

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[2]As Miramax points out, any theater is equipped to exhibit art films and theaters which are not known as "art houses" can and do decide to show such films as well as the more commercial fare.

opening in January of 1992 until March of 1994, Orson was granted about 73 first-run exclusive licenses by 59 different distributors. According to Orson's President, Max L. Raab, art film distributors included, in addition to Miramax, three "distributors of consequence" - Sony Pictures Classics, the Samuel Goldwyn Company and Tristar Pictures.

All of the first-run licenses for films that Miramax granted to the Ritz were exclusive; that is, they provided that the films would not be licensed to another Center City theater while playing there. The licenses were established quite informally. Typically, Posel of the Ritz telephoned Martin Zeidman, Miramax's Senior Executive Vice President and head of domestic distribution, to discuss the Ritz's desire for a first-run license on a particular Miramax film. Having done business with one another for several years, Posel and Zeidman understood that the license would be exclusive and include standard terms. Once the parties agreed upon an opening date, Zeidman completed a "Theatrical Booking Worksheet," which set forth the title of the film and the opening date, listed the Ritz Five theaters or the Ritz at the Bourse as the exhibitor, identified Posel as the buyer, marked the rental percentage terms, and designated the shipping territory as "Phila[delphia]." A day or two later, the booking worksheet was telefaxed from Zeidman's office in Los Angeles to Miramax's office in New York, which was responsible for shipping Miramax film prints to theaters in time for the opening date.

On occasion, Orson's film buyer, Jeffrey Fox Jacobs, asked Zeidman for a first-run, non-exclusive license on a Miramax film, indicating that Orson was prepared to offer Miramax a higher percentage of the Roxy's box office receipts and a lower house allowance than those negotiated by the Ritz. Jacobs' requests, however, were refused.

From time to time, Miramax held trade screenings for the movies it distributed in Philadelphia. Miramax would send a notice to exhibitors, inviting them to attend the trade screening of a certain film on a certain date. Most of the notices stated that "[w]e expect to avail this film for first run Philadelphia on or about [date], for an exclusive or non-exclusive run. After the first run theater or theaters have exhibited the film for 42 days we will consider offers for subsequent runs." The notice requested that a "written offer" be

submitted by interested exhibitors by a specified time and day.

With respect to some of the clearances that Miramax granted the Roxy, the booking worksheet that Zeidman completed memorializing the clearance bore a date that was prior in time to the date of the trade screening notice that Miramax sent to exhibitors.[3]

Fifteen of the films that Miramax licensed to the Ritz played there for a period of more than 42 days. Of these, nine expanded to other Philadelphia area theaters outside of Center City before the 42 days expired; six, however, ran at the Ritz without expanding to other theaters.

According to the parties' briefs, the Roxy closed its doors in October of 1994.

On or about August 2, 1993, Orson commenced this action against Miramax. On August 19, 1993, Orson filed an amended complaint in three counts: Count I alleged that Miramax violated section 1 of the Sherman Act by, *inter alia*, conspiring with the Ritz to exclude the Roxy from the art film market by making the Ritz its "exclusive Philadelphia exhibitor for first-run art film features" and by granting the Ritz "exclusive first-run rights to those of Miramax'[s] films which the Ritz want[ed] to exhibit. . . ."[4] Count II

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[3] For example, the trade screening notice for "The Crying Game" was dated December 1, 1992. The notice announced that the first Philadelphia run would occur on or about December 18, 1992, invited Philadelphia exhibitors to a December 8, 1992, screening, and requested that written offers be submitted no later than 12 noon on December 10, 1992. Zeidman's worksheet, which memorialized the clearance given to the Ritz for The Crying Game," however, had a telefax legend dated November 30, 1992.

[4] Orson's amended complaint included allegations of additional anticompetitive practices by Miramax. These allegations were abandoned with the exception of allegations of retaliatory conduct on Miramax's part, which Orson subsequently pursued by way of a motion for injunctive relief. *See supra* p. 9. In its motion, Orson relied on *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F. 2d 725, 728 (3d Cir. 1962), an antitrust case where the we held that a court may grant a preliminary injunction when a party engages in conduct calculated to frustrate litigation, and alleged that Miramax's refusal to grant the Roxy any more licenses, including a license for a subsequent run on "Strictly Ballroom" was retaliatory; that Miramax films were not indispensable to Orson's survival; that Orson had delayed asking for preliminary relief; that a preliminary injunction would, under the circumstances, be difficult to administer; that Orson's contention that it would be

alleged that Miramax violated Pennsylvania's common law doctrine against unreasonable restraint of trade"; and Count III alleged that Miramax violated section 203-7 of Pennsylvania's Feature Motion Picture Fair Business Practices Law, 73 P.S. § 203-1 *et. seq.* (the "Pennsylvania Act") by "consistently grant[ing] the Ritz licenses for its feature art films for exclusive first runs for more than 42 days. . . ."[5]

On October 8, 1993, Orson filed a "Motion for Injunctive Relief to Restore the Status Quo during Pendency of Litigation." On November 9, 1993, the district court denied Orson's motion, *Orson Inc. v. Miramax Film Corp.*, 836 F. Supp. 309 (E.D. Pa. 1993); on January 12, 1994, the court denied Orson's motion for reconsideration.

On March 22, 1994, Orson filed a motion for partial summary judgment on its common law restraint of trade claim and its Pennsylvania Act claim. Miramax filed a cross-motion for summary judgment on two claims which, according to Miramax, were not set forth Orson's complaint, but nonetheless discussed in

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unable to secure witnesses for trial because of other theaters' fear of retaliation was speculative; that Orson's alleged harm was compensable in money damages; that the preliminary injunction would be oppressive to Miramax; that Orson had not shown that it was likely to succeed on its antitrust claims; and that Orson's request for Miramax films exceeded the status quo. *Orson, Inc. v. Miramax Film Corp.*, 836 F. Supp. 309 (E.D. Pa. 1993).

In this appeal, Orson has also challenged the district court's decision to deny the motion for injunctive relief. This issue, however, is moot. In light of both of our decision to uphold the court's order granting summary judgment to Miramax on Orson's antitrust claims and of the Roxy's cessation of operations.

[5] Section 203-7 of Pennsylvania's Feature Motion Picture Business Law, 73 P.S. §203-1 *et seq.* (the "Pennsylvania Act"), states:

> **§ 203-7. Length of run**
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> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theaters within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theaters that would be served on subsequent run availability.

73 P.S. § 203-7.

Orson's summary judgment motion, namely violations of sections 203-4 (bidding) and 203-8 (screening procedures) of the Pennsylvania Act.

On October 5, 1994, the district court denied Orson's motion for partial summary judgment in its entirety. *Orson, Inc. v. Miramax Film Corp.*, 862 F. Supp. 1378, 1390 (E.D. Pa. 1994).

As for Miramax's motion, the district court granted summary judgment to Miramax on both Orson's federal and state antitrust claims.[6] *Id.* Characterizing the Miramax Ritz agreement "by which Miramax grant[ed] exclusive licenses to the Ritz for the exhibition of its art films" as "clearly a vertical agreement between a distributor and an exhibitor," the court applied the rule of reason to the restraint at issue." *Id.* at 1385-86. Focusing on the competitive effects of the exclusive license, otherwise known in the industry as "clearances," the court concluded that the clearances were reasonable:

> [T]his Court holds that the clearances at issue here are reasonable. First while the clearances stifle intrabrand competition to a small degree--no Miramax art film playing at the Ritz can play contemporaneously at the Roxy, the clearances serve to stimulate competition between art films distributed by Miramax and art films originating with other distributors. As a result, art film-goers in Center City Philadelphia are offered a wider array of selections from which to choose. Further, it is apparent that the Ritz and the Roxy are in substantial competition. By Orson's own

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[6] On summary judgment, the parties agreed that Pennsylvania's common law against unreasonable restraints against unreasonable restraints of trade follows federal antitrust law. *Orson, Inc. v. Miramax Film Corp.*, 862 F. Supp. 1378, 1381 n.3 (E.D. Pa. 1994). Accordingly, the district court treated Orson's federal and antitrust claims identically. *Id.* Likewise, in this appeal, Orson briefs only the federal antitrust issues.

Further, since Orson had raised, in the district court's view, an issue for summary judgment by arguing in its brief in opposition to Miramax's motion that the Miramax-Ritz agreement should be declared illegal per se, the court evaluated the parties' submissions as though it had before it cross-motions for summary judgment as to Orson's entire complaint, even though Orson had moved expressly for summary judgment on only its Pennsylvania law claims. *Id.* at 1382. Orson does not question this aspect of the district court's decision on appeal.

> admission, the Ritz and the Roxy are the only two art houses in Center City Philadelphia. Thus, if the Ritz and the Roxy were to exhibit the same film on the same dates, not only would the overall degree of choice be reduced, but the Ritz, would assuredly lose income as a result. At its core, Orson's complaint asks the Court to compel Miramax to lease its films to Orson for exhibition at the Roxy. The antitrust laws were not enacted to achieve such ends.

Id. at 1386.

With regard to Miramax's summary judgment motion on Orson's section 203-7 Pennsylvania Act claim, the district court concluded that Miramax was not liable for the nine films that were expanded to suburban Philadelphia theaters on or before the forty-third day of their runs at the Ritz, reasoning that section 203-7 only required that Miramax expand the films to other theaters in the Philadelphia area, not to other theaters located within Center City. *Id.* at 1387-88. As to the six films that were licensed exclusively to the Ritz without expanding to other theaters within 42 days, the court denied Miramax summary judgment, concluding that material issues of fact had been raised as to the existence and terms of the licenses and as to Orson's damages and Miramax's intent.[7] *Id.* at 1388.

Finally, agreeing with Miramax that a party may not be granted summary judgment on claims that are not set forth in its complaint, the court granted Miramax's cross-motion for summary judgment. *Id.* at 1388-90. At the same time, however, the court granted Orson leave to amend its complaint to add claims under sections 203-4 and 203-8 of the Pennsylvania Act. *Id.* at 1390.

After filing a second amended complaint on October 19,

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[7] Section 203-10 of the Pennsylvania Act, which covers the actions that an exhibitor may bring for alleged violations of the Act, states:

> **§203-10. Actions against distributors and exhibitors**
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> Any exhibitor may bring an action against a distributor or exhibitor or both in the respective courts of common pleas wherein the exhibitor's business is located to recover damages sustained by reason of a willful and intentional violation of his act and, where appropriate, shall be entitled to injunctive relief. Such exhibitor, if successful, shall also be awarded the costs of the action include, but not limited to, reasonable attorneys' fees.

73 P.S. §203-10.

1994, which added section 203-4 and section 203-8 Pennsylvania Act claims in Counts IV and V respectively. Orson sought certification of the district court's October 5, 1994 order pursuant to 28 U.S.C. § 1292(b). The court denied Orson's request for certification.

Ultimately, based on its rulings on summary judgment and the parties' stipulation, the district court issued a final order on May 10, 1995, entering judgment in Miramax's favor on Orson's federal and state antitrust claims and on Orson's section 203-7 claim as to the nine films that Miramax distributed on a subsequent-run basis to theaters in the greater metropolitan Philadelphia area. The court's May 10 order also dismissed without prejudice Orson's section 203-4 and 203-8 claim, and Orson's section 203-7 claim with respect to the six Miramax films that did not expand to other theaters after showing at the Ritz for 42 days.

This timely appeal by Orson followed. It involves the district court's decision to grant summary judgment to Miramax on Orson's antitrust claims and on Orson's Pennsylvania Act section 203-7 claim with respect to the nine subsequent-run Miramax films that played in Philadelphia theaters located outside of Center City on or before the forty-second day of their first-run at the Ritz,[8] as well as the court's denial of Orson's request for preliminary injunctive relief. We will first address the federal antitrust issues this appeal raises, and the state statutory law question second.

II.

Summary judgment may present the district court with an opportunity to dispose of meritless cases and avoid wasteful trials. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). This is true even in antitrust cases "'where motive and intent play leading roles, proof is largely in the hands of alleged conspirators, and hostile witnesses thicken the plot.'" *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1362 (3d Cir. 1992), *cert. denied*, 507

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[8] Since the district court's May 10, 1995 order was a final order, 28 U.S.C. § 1291 gives us appellate jurisdiction over this entire case. Thus, our power of review extends not only to that portion of the district court's order which reflects its decision to grant summary judgment to Miramax, but to that portion of its order which reflects its decision to deny Orson's cross-motion for summary judgment as well. *International Union, United Mine Workers of America v. Racho Trucking Co.*, 897 F.2d 1248, 1252 n.2 (3d Cir. 1990).

U.S. 912 (1993), (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962)).

Summary judgment must be granted where no genuine issue of material fact exists for resolution at trial and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On summary judgment, the moving party need not disprove the opposing party's claim, but does have the burden to show the absence of any genuine issues of material fact. *Celotex*, 477 U.S. at 322-23. If the movant meets this burden, then the opponent may not rest on allegations in pleadings, but must counter with specific facts which demonstrate that there exists a genuine issue for trial. *Id.* at 323. When the nonmoving party will bear the burden of proof at trial, the moving party may meet its burden by showing that the nonmoving party has not offered evidence sufficient to establish the existence of an element essential to its case. *Id.* at 322. We remain mindful that in ruling on a motion for summary judgment, a court must assess the material facts in light of the proof required of the plaintiff on substantive issues.

III.

Section 1 of the Sherman Act provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy,. in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1. For a section 1 claim under the Sherman Act, "a plaintiff must prove 'concerted action,' a collective reference to the 'contract . . . combination or conspiracy.'" *Big Apple BMW*, 974 F.2d at 1364 (quoting *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978)), *cert denied*, 507 U.S. 912 (1993). A "'unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement'" must exist to trigger section 1 liability. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). In addition to the element of concerted action, a plaintiff must prove that anticompetitive effects were produced within the relevant product and geographic markets; that the objects of the conduct pursuant to the concerted action were illegal, and that it was injured as a proximate result of the conspiracy. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998

F.2d 1224, 1229 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 554 (1993).

Virtually all business agreements restrain trade to some extent; section 1, therefore, has been construed to make illegal only those contracts that constitute unreasonable restraints of trade. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988). Whether a business arrangement unreasonably restrains trade is determined by the courts, on a case-by-case basis, using a rule of reason which considers all relevant factors in examining a defendant's purpose in implementing the restraint and the restraint's effect on competition. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918).[7] Indeed, the traditional rule of reason

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[7] There are certain agreements or practices which "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Such "plainly anticompetitive" agreements are illegal *per se*. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978). Horizontal boycotts have received illegal *per se* treatment. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Although Orson contended in the district court that Miramax's relationship with the Ritz was illegal *per se*, and occasionally speaks of the relationship as a "boycott," it does not contend in this appeal that the *per se* rule applies.

In addition to the traditional rule of reason and the *per se* rules, courts sometimes apply what amounts to an abbreviated or "quick look" rule of reason analysis. *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993). This abbreviated rule applies where *per se* condemnation is inappropriate, but where a full-blown industry analysis is not required demonstrate the anticompetitive character of an inherently suspect restraint. *Id.* For example, in cases involving agreements not to compete in terms of price or output among members of professional associations, the Supreme Court did not apply a *per se* analysis, opting instead for an abbreviated rule of reason test where "'no elaborate industry analysis [was] required to demonstrate the anticompetitive character of such an agreement.'" *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (quoting *Professional Eng'rs*, 435 U.S. at 692).

Asserting in its brief that "[t]he restraint's negative effect on competition is manifest given the abundance of record evidence showing that the Miramax-Ritz boycott of the Roxy had the effect of decreasing output and increasing prices in the Center City art-film market," Orson suggests that an abbreviated rule of reason market analysis should be used here. Orson failed, however, to substantiate its assertion with facts. We have stated that arguments made in legal memoranda are not evidence. *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103,

inquiry has essentially remained unchanged since it was first announced by the Supreme Court in *Chicago Board of Trade* and focuses on the competitive significance of the restraint:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought, to be attained, are all relevant facts.

Chicago Board of Trade, 246 U.S. at 238.

In rule of reason cases, the plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. *Brown Univ.*, 5 F.3d at 668. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services. *Id.* Due to the difficulty of isolating the market effects of the challenged conduct, however, such proof is often impossible to make. *Id.* Accordingly, the courts allow proof of the defendant's "market power" instead. *Id.* Market power -- the ability to raise prices above those that would prevail in a competitive market -- is essentially a "'surrogate for detrimental effects.'" *Id.* at 668-69 (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986)).

If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anticompetitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective. *Id.* at 669. To rebut, the plaintiff must demonstrate that the restraint is not

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1109-10 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). We, therefore, need not consider Orson's suggestion further.

reasonably necessary to achieve the stated objective. *Id.*

Agreements between entities at different market levels are termed "vertical restraints." *See United States v. Topco* Assocs., *Inc.*, 405 U.S. 596, 608 (1972). The Supreme Court has instructed that vertical restraints of trade, which do not present an express or implied agreement to set resale prices, are evaluated under the rule of reason. *Business Elec. Corp.*, 485 U.S. at 724; *see also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The Supreme Court has also repeatedly confirmed in vertical restraint cases that interbrand competition, as opposed to intrabrand competition, is the primary goal of the antitrust laws. *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722-23 (3d Cir. 1991) (citing *Business Elecs. Corp.*, 485 U.S. 717, and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *GTE Sylvania*, 433 U.S. at 36), *cert. denied*, 505 U.S. 1221 (1992).[10]

IV.

We now address the antitrust issues raised by the business

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[10] In *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), a television manufacturer entered into franchise agreements which prohibited the sale of its products from other than specified locations. Discussing the application of the rule of reason to vertical restraints, the Supreme Court explained the difference between interbrand and intrabrand competition:

> Interbrand competition is the competition among the manufacturers of the same generic product -- television sets in this case -- and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors -- wholesale or retail -- of the product of a particular manufacturer.
>
> The degree of intrabrand competition is wholly independent of the level or interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.

Id. at 52 n. 19.

arrangement in this case. We note at this point that Miramax conceded for purposes of summary judgment that the relevant product market was art films and that the relevant geographic market was Center City, Philadelphia. Our evaluation of Orson's antitrust claim, therefore, proceeds on this basis.

The first issue we consider is the precise nature of the agreement between Miramax and the Ritz. Orson alleges in its second amended complaint that Miramax committed to make the Ritz its "exclusive Philadelphia exhibitor for first-run art film features. . . ." Based on our careful review of the evidence, we disagree. The record is devoid of any proof of a promise on Miramax's part that it would grant first-run licenses on its films in Center City to the Ritz only. Moreover, the evidence is to the contrary, the Roxy received a first-run license from Miramax, as did the theaters operated in Center City by United Artists and American Multi-Cinema. The record shows, instead, a series of clearances granted by Miramax to the Ritz, based on an understanding between the parties' respective principals that any time the Ritz was showing a first-run Miramax film, its license would be exclusive.

Before we consider the antitrust significance of the clearances, however, we will address the alleged conspiracy that we believe lies at the heart of Orson's second amended complaint. As we understand it, Orson's antitrust theory does not primarily challenge the clearances themselves; but rather, claims that the clearances were mere vehicles that Miramax and the Ritz used to further a secret conspiracy to drive the Roxy out of business by denying that theater first-run Miramax films.

A.

Our evaluation of Orson's allegations concerning a scheme on the part of Miramax and the Ritz to destroy the Roxy is controlled by our decision in *Houser v. Fox Theaters Management Corp.*, 845 F.2d 1225 (3d Cir. 1988). There the owners of the Colonial Theater (the "Housers") brought antitrust action against several motion picture distributors and the owners of the Fox theaters ("Fox"), alleging, *inter alia*, that each of the distributor defendants violated section 1 of the Sherman Act by conspiring individually with Fox to deny the Colonial first-run films. *Id.* at 1229. To support this claim, we required the Housers to present "direct or circumstantial evidence

that reasonably tend[ed] to prove the alleged conspirators 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* at 1232 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). We further instructed that in doing so, the Housers had to show "'(1) that the defendants acted in contradiction of their economic interests, and (2) that the defendants had a motive to enter into an agreement.'" *Id.* (quoting *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir. 1980)).

As to Our first enumerated element, the Housers asserted that the distributors had acted against their economic interests by consistently choosing to license films to the Fox theaters rather than the Colonial. They argued that "'[o]n a purely objective basis, the Colonial was a better theater than any of the five Fox theaters'" in view of its "large seating capacity, elegant and well-maintained condition, and its location in a nice section of downtown in contrast to the alleged 'dark and dingy' quality of the narrow suburban twin theaters and the downtown theater owned by Fox." *Id.* at 1232. Despite the Housers' assertion, we held that there was not sufficient evidence of record to permit a factfinder to conclude that the distributor defendants had acted contrary to their economic interests; we affirmed the order of the district court granting the defendants summary judgment. *Id* at 1233. We observed that "the decision to license a picture to one theater rather than another is based on a complicated subjective estimation of a theater's grossing potential" and that the courts have recognized that "motion picture distributors have broad discretion to make licensing decisions based on their own independent judgments." *Id.* at 1232. Pointing out that the Housers' argument failed for emphasizing just a few of the factors that a distributor considers In making its licensing decision while ignoring others, we stated that "[s]uch factors as a proven track record of high box office receipts and an unblemished payment history are as important as the seating capacity or aesthetic qualities of a theater when estimating its grossing potential." *Id.* at 1232. We also concluded that the Housers did not substantiate their allegations that the distributors conspired with Fox because they feared that Fox would use its "circuit power" and refuse to do business with them. *Id.* at 1233. We, therefore, further held that even if the distributors had

acted contrary to their economic interests, the Housers failed to present evidence to support the second essential element we had articulated, namely, that the distributors were motivated to conspire individually with Fox. *Id.*

Orson makes similar assertions here, it contends that given its willingness to pay a higher percentage of the Roxy's gross for first-run Miramax films than paid by the Ritz, Miramax acted contrary to its economic well-being by choosing to grant clearances to the Ritz; it further maintains that Miramax was coerced into favoring the Ritz because the Ritz had made it clear that unless it was granted an exclusive arrangement it would use its clout, and refuse to play Miramax films.

We do not find sufficient evidence in the record for either assertion. To the contrary, the evidence establishes that the clearances were consistent with Miramax's business interests, granted by the distributor to, as between the Roxy and the Ritz, the theater it reasonably predicted would generate greater income. The record demonstrated that the Ritz had ten screens at two locations with seating capacities of 1,125 and 710 respectively, while the Roxy had two screens with a seating capacity of 130 each. The Ritz had a solid history of box office receipts; by comparison, the Roxy was not nearly as profitable. The theaters which comprised the Ritz had been in continuous operation since their inception; the Roxy, on the other hand, had ceased operations from time to time over the years. The Ritz marketed the films it exhibited and was known to have outstanding sound and projection equipment. Simply put, "[I]n light of the broad discretion that must be given to film distributors in making complete licensing decisions," *id.* at 1233, Orson's position, premised solely on the financial terms of its offer, is insufficient to call into question the wisdom of Miramax's decision. We, therefore, hold that the evidence in the record is insufficient to permit the factfinder to conclude that Miramax acted contrary to its self-interest by choosing to license exclusively to the Ritz rather than the Roxy.

Moreover, the deposition testimony that Orson offered to support its assertion that the Ritz had unduly pressured Miramax in its licensing decisions, even when viewed in Orson's favor, shows nothing of the kind. The testimony of Raymond Posel and Martin Zeidman demonstrates only that there existed a mutual understanding

between the representatives of Miramax and the Ritz that the Ritz first-run licenses on Miramax films would be exclusive. Thus, we also conclude that Orson failed to show that Miramax had a motive to conspire with the Ritz to drive the Roxy out of business.

Lastly, we observe that Orson expended considerable effort describing the "trade screening charade" and the "sham bidding" in which Miramax and the Ritz, allegedly engaged, contending that these practices were perpetuated by the parties to conceal their unlawful scheme. We have concluded, however, that Orson failed to present sufficient evidence to show that Miramax and the Ritz conspired to drive the Roxy from the market; we need not, therefore, consider Orson's allegations of a cover-up on their part. Further, Orson's assertions about improper bidding, without more, lack antitrust significance in this case. As we recognized in *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 P.2d 440 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978). ""the Sherman Act is neither a lowest-responsible-bidder statute nor a panacea for all business affronts which seem to fit nowhere else.'" *Id.* at 448 (citation omitted).[11]

Therefore, we conclude that Orson failed to sustain its burden on summary judgment regarding the essential elements of its antitrust conspiracy claim.

B.

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[11] The clearances at issue in *United States v. Paramount Pictures*, 334 U.S. 131 (1948), involved, *inter alia*, five major defendants which produced motion pictures and their respective subsidiaries or affiliates which distributed and exhibited films. The evidence showed that the clearances were not typical, bearing no relation to the competitive factors which usually justify them. *Id.* at 146. By way of illustration, the Court set forth the following finding of the district court:

> Some licenses granted clearance to sell to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement."

Id. at n.7.

Our inquiry does not end here. The fact remains that clearances existed between Miramax and the Ritz, and that Orson contends that they violated section 1 of the Sherman Act.

We begin our analysis of this aspect of Orson's case with a general discussion of clearances. We first observe that clearances, which involve entities at different levels of the film distribution industry, are vertical, nonprice restraints of trade. *See Three Movies of Tarzana v. Pacific Theaters, Inc.*, 828 F.2d 1395, 1399 (9th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *see also United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). As such, they are subject under section 1 to a rule of reason analysis. *Three Movies of Tarzana*, 828 F.2d at 1399.

Clearances have undergone antitrust scrutiny. Some time ago, in *Paramount Pictures*, 334 U.S. 131, the Supreme Court reviewed a district court decree which resolved an antitrust action brought by the Department of Justice against several producers, distributors and exhibitors of motion pictures for various Sherman Act violations, including the maintenance of a system of allegedly unlawful clearances. Affirming the district court's decision to enjoin the defendants from continuing their clearance practices, the Court approvingly referenced the district court's view that clearances are justified by "the assurance they give the exhibitor that the distributor will not license a competitor to show the film either at the same time or so soon thereafter that the exhibitor's expected income from the run will be greatly diminished," as well as the court's conclusion that reasonable clearances require that the theaters involved substantially compete. *Id.* at 144-47.[12]

More recently, in *Three Movies of Tarzana*, 828 F.2d 1395, the Court of Appeals for the Ninth Circuit considered whether certain clearances were reasonable restraints of trade under the circumstances presented. There the owner of a movie theater ["TMT"] brought suit against a competing exhibitor ("Pacific") and several movie distributors, alleging that first-run clearances granted to Pacific's Galleria Theater by the distributors violated section 1 of the Sherman Act. The district court granted summary judgment to the defendants, the court of appeals affirmed, noting that the courts have acknowledged over the years that "'the whole system of runs and clearances . . . purposely, and legitimately, discriminates between

competing exhibitors.'" *Id.* at 1399 (citations omitted). After initially observing that the reasonableness of a particular restraint depends upon an understanding of the industry at issue and a balancing of the restraint's positive and negative effects on competition, the court of appeals concluded that although the clearances the Galleria received reduced intrabrand competition to a minor degree, they "also encouraged interbrand competition by forcing TMT to find alternative suburban movies to exhibit and to promote." *Id.* at 1399. Considering next the relationship between the Galleria and TMT, the court determined that in view of the fact that the theaters competed, the clearances reflected a reasonable business decision on both sides of the transaction:

> Because the two theaters were in substantial competition, Pacific [the exhibitor] was properly concerned that exhibiting first runs at TMT's theater simultaneously with the Galleria would diminish the Galleria's income. Pacific wanted to recoup its investment in the Galleria and advertising, rather than allow TMT's theater to "free ride" on its advertising.
>
> The distributors had a legitimate business interest in the revenue generated by the theaters they licensed, because the distributors were paid, in part, out of each movie's gross profits. The distributors wished to reach the largest number of viewers with the smallest number of movie prints, to recoup quickly their own investment.

Id. at 1399-40 (citations omitted).

Guided by applicable rules of federal antitrust law and the cases we have reviewed, we conclude that the reasonableness of a clearance under section 1 of the Sherman Act depends on the competitive stance of the theaters involved and the clearance's effect on competition, especially the interbrand competition which, as the Supreme Court has instructed, is our primary concern in an antitrust action.

Applying these criteria to the clearances before us, we begin with the fact that the parties agreed that the Roxy and the Ritz were in competition. Thus, the clearances served their accepted purpose of assuring both Miramax and the Ritz that the return from one run of a particular Miramax film would not be diminished.

Turning to the touchstone of the rule of reason, the clearances' competitive effects, the uncontroverted facts of record reveal a market in which competition thrived at both the distributor and exhibitor levels. In Center City, the Roxy, the Ritz, and the theaters owned by United Artists and American Multi-Cinema vied for the films of at least 59 distributors. Indeed, it is the indisputable existence of alternative sources of supply for the Roxy which negates the existence of anticompetitive effects in this case. Although the Miramax-Ritz clearances most certainly reduced intrabrand competition to some degree by disallowing the Roxy from showing on a first-run basis any Miramax film that the Ritz had selected, they undeniably promoted interbrand competition by requiring the Roxy to seek out and exhibit the films of other distributors, which it consistently accomplished. Thus, in our view, the record conclusively establishes that the clearances did not produce the anticompetitive effects the Sherman Act was designed to prevent. On the contrary, competition in the relevant market was enhanced; art film consumers in Center City had more movies from which to choose. In an apparent attempt to avoid this absence of proof on an essential element of its case, Orson alluded in its brief to Miramax's having market power, arguing that the distributor had "enormous financial clout" and "solidified its leading position among independent film distributors" subsequent to its acquisition by the Walt Disney Company in 1993. Orson did not, however, present a factual basis for this belief. As we have stated, [l]egal memoranda and oral argument are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion." *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986).[12]

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[12] Miramax contends that Orson also failed to show that it suffered antitrust injury. Since Orson did not meet its burden of presenting sufficient evidence to demonstrate that competition was suppressed, we need not address this issue.

We also note that Orson did not allege nor did it present evidence to show that Miramax was a monopolist or that *only Miramax* films constituted the relevant product market. *See Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 723 (3d Cir. 1991) ([I]t is also true that a well-defined submarket may constitute a relevant product market and so under certain circumstances a relevant product market could consist of one brand of a product, placing intrabrand competition at issue."), *cert.*

We thus conclude that Orson failed to present sufficient evidence to support its claim that the Miramax-Ritz clearances were unreasonable restraints of trade.

V.

We turn now to Orson's state law claim brought under section 203-7 of the Pennsylvania Act. Orson alleges that Miramax violated 73 P.S. §203-7 when it expanded the runs of nine films that had played exclusively at the Ritz for 42 days or less to theaters located in the suburbs of Philadelphia, but not to other Center City theaters.

Section 203-7 provides in pertinent part that "[n]o license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theaters within the geographical area. 73 P.S. § 203-7 (emphasis added).

On summary judgment, Miramax argued that it complied with section 203-7 because the relevant "geographical area" as contemplated by section 203-7 was the greater Philadelphia metropolitan area; Orson, by contrast, contended that the expansions to suburban theaters were legally irrelevant because section 203-7 required that Miramax expand the run of each film it licensed, exclusively to the Ritz to theaters located within the geographical area covered by the license, namely, Center City.[13]

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denied, 505 U.S. 1221 (1992). We make these points because Orson's antitrust theory frequently seemed premised on an analysis of a market which was limited to Miramax's product.

[13]Believing that Orson is "apparently contending that [s]ection 203-7 compels distributors to terminate a first run at one theater, such as the Ritz after 42 days and open another run at a competing theater, such as the Roxy," Miramax argues that, if interpreted this way, the Pennsylvania Act would be preempted by the Federal Copyright Act. 17 U.S.C. §§ 101-914. Orson, however, states in its reply brief that it does not maintain that section 203-7 compels distributors to terminate a first run at one theater and appears to argue that section 203-7 would only require that another theater in the relevant geographic area be permitted to share in the run after 42 days. In the trade, a first-run "day and date" refers to the first-run exhibition of a film by two theaters at the same time. *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 539 n.7 (1954).

At any rate, we have already rejected a facial challenge to section 203-7

The district court found section 203-7's wording "sufficiently vague" to permit these alternative interpretations. *Orson, Inc. v. Miramax Film Corp.*, 862 F. Supp. 1378, 1387 (E.D. Pa. 1994). Noting that one of the purposes of the Pennsylvania Act is to "'promote the wide geographical dissemination at reasonable prices to the public of ideas, opinions and artistic expression in feature motion pictures,'" 73 P.S. §203-2(4), and that another identified purpose of the Act is to "foster vigorous and healthy competition in the film business, *id.* § 203-2(3), the court agreed with Miramax and held that since the Pennsylvania legislature's "primary purpose in enacting section 203-7 was not, to increase market rivalry among direct competitors, but instead to promote the wide distribution of movies throughout Pennsylvania[,] . . . Miramax can incur no 203-7 liability for the 9 films that were expanded to other Philadelphia area theaters on or before the forty-third day of their runs at the Ritz." *Id.* (footnote omitted).

The Pennsylvania Supreme Court, has not interpreted section 203-7. We, therefore, must predict how the Court would interpret and apply that section. *Borman v. Raymark Indus. Inc.*, 960 F.2d 327, 331 (3d Cir. 1992). Unfortunately, there are no intermediate appellate court decisions to assist us.[14]

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under the Copyright Act, holding that "the Act on its face contain no threat to the copyrights themselves. . . ." *Associated Film Distribution Corp. v. Thronburgh*, 683 F.2d 808, 816 (3d Cir. 1982). *cert. denied, 480* U.S. 933 (1987). *See Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369, 377 (3d Cir. 1986, *cert. denied*, 480 U.S. 933 (1987) ("There may be merit to the distributors' argument that the 42-day provision, when construed as limiting the distributors' right to license an exclusive run to 42 days, is preempted by the Copyright Act. However, such preemption would be apparent on the face of the statute and cannot be reconciled with [our] earlier decision [in *Associated Films*, 683 F.2d at 816] that the Act is not facially invalid under the Copyright Act.").

[14] When a federal district court exercises diversity jurisdiction, it must apply the substantive law as decided by the highest court of the state whose law governs the action. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Commercial Union Ins. Co. v. Bituminous Casualty Corp.*, 851 F.2d 98, 100 (3d Cir. 1988). When the state's highest court has not addressed the precise question presented, a federal court must predict how the state's highest court would resolve the issue. *Borman v. Raymark Indus., Inc.*, 960 F.2d 327, 331 (3d Cir. 1992). Although not dispositive decisions of state intermediate appellate courts should be

Pennsylvania abides by well-known rules of statutory construction. When construing a statute, the Pennsylvania courts must ascertain and effectuate the Pennsylvania Legislature's intent. 1 Pa. Cons. Stat. Ann. § 1921(a); *Commonwealth v. Lopez*, 444 Pa. Super. 206, 663 A.2d 746, 748 (1995). The courts' "starting point is the language therein, absent any evidence to the contrary. A statute's plain meaning must prevail." *Retenauer v. Flaherty*, 164 Pa. Commw. 182, 191, 642 A.2d 587, 591 (1994), 1 Pa. Cons. Stat. Ann. § 1921(a). Any word or phrase, not otherwise defined, must be construed according to the rules of grammar and according to the common and approved usage. 1 Pa. Cons. Stat. Ann. § 1903(a); *Martin Media v. Commonwealth*, ____ *Pa.* Commw. ___, 661 A.2d 479, 481 n.2 (1995). Further, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit, 1 Pa. Cons. Stat. Ann. § 1921(b), and the courts may not insert language into a statutory provision where the legislature has failed to supply it. *Key Savings and Loan Ass'n v. Louis John, Inc.*, 379 Pa. Super. 226, 232, 549 A.2d 988, 991 (1988). The courts should give effect to all sections of an act rather than interpreting the language in such a way that one clause is rendered superfluous or meaningless for the benefit of another. 1 Pa. Cons. Stat. Ann. § 1921(a); *Key Savings and Loan Ass'n, 379* Pa. Super. at 232, 549 A..2d at 991. Finally, when a word or phrase is ambiguous, the courts must look beyond the statutory language and attempt to ascertain the intention of the legislature by reference to various statutory factors, including the occasion and necessity for the statute, the circumstances of its enactment; the mischief it remedies; the object it seeks to attain; former law; the consequences of a particular interpretation; contemporaneous legislative history; and legislative and administrative interpretations of the statute. 1 Pa. Cons. Stat. Ann. § 1921(c).

With these principles in mind, we conclude that the district court's interpretation of section 203-7 is erroneous. Although section

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accorded significant weight in the absence of an indication that the highest state court would rule otherwise. See *Rolick v. Collins Pine Co.*, 925 F.2d 661, 664 (3d Cir. 1991), *cert. denied*, *507* U.S. 973 (1993). Our review of the district court's prediction and application of state law is plenary. *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 613 (3d Cir. 1992).

203-7 may be less than clear in certain respects, it is not ambiguous as to where an exclusive first-run license must provide for expansion. We believe that as a matter of simple semantics, the statute's "within the geographical area"[15] phrase can only refer to the place where the license was granted in the first place. In our view, when the district court interpreted section 203-7 to sanction expansion to theaters outside of Center City, the plain meaning of the statute's language was distorted since the word "within" in that phrase was ignored. Moreover, in referring to the Act's expressed purposes to support its interpretation, the court overlooked the purpose which reflects the Pennsylvania Legislature's intention to limit, as Orson argues, the length of first-run licenses in the very areas they cover:

> [to] benefit the movie going public by limiting the long and extensive first runs so that additional theaters, in a given area, may also exhibit, the same feature motion picture and at possibly a lower admission price . . . .

73 P.S. §203-2(9).

We therefore conclude that section 203-7 prohibits a distributor and exhibitor from entering into a license agreement which grants an exclusive first-run for more than 42 days without providing for expansion in the same geographic area covered by the license. Because the record is either disputed or incomplete in critical respects, however, we cannot resolve Orson's section 203-7 claim on summary judgment. Further proceedings are necessary to resolve, for example, the length of run and expansion terms, if any, of the licenses, the availability of license agreements and film prints, if relevant, to subsequent run theaters, Orson's damages, and Miramax's

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[15] We note that the Pennsylvania Act does not define "geographical area". The Act, however, defines "Run" in section 203-3 as [t]he continuous exhibition of a feature motion picture in a *defined geographical area* for a specified period of time." 73 P.S. § 203-3 (emphasis added). Section 203-7, unlike section 203-3, does not have the word "defined" before "geographical area". This omission does not change our analysis, even though a Pennsylvania rule of statutory construction provides that "where a section of a statute contains a given word, the omission of such word from a similar section of the statute shows a different legislative intent." *Commonwealth v. Berryman*, *437* Pa. Super. 258, 267, 649 A.2d 961, 965 (1994). This single rule cannot overcome what we see as the plain meaning of section 203-7 and the Pennsylvania Legislature's intent in enacting it.

Intent. *See* 73 P.S. §§ 203-7. 203-10.

Thus, we conclude that Miramax was not entitled to summary judgment on Orson's section 203-7 Pennsylvania Act claim.

VI.

For the foregoing reasons, we will affirm the district court's grant of summary judgment on Counts I and II of the second amended complaint in Miramax's favor. We will vacate the district court's order granting summary judgment to Miramax on Count III as to the nine films that expanded to Philadelphia theaters Outside of Center City on or before the forty-second day of their runs at the Ritz and remand for further proceedings on Orson's claim that Miramax's actions as to these nine films violated section 203-7 of the Pennsylvania Act.[16]

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[16] Each party is entitled to the costs it incurred on those claims on which it prevailed on appeal. The parties shall notify the Clerk's Office if they are unable to resolve this division of costs between themselves.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ORSON, INC. d/b/a The Roxy Screening Rooms,	)	CIVIL ACTION
Plaintiff,	)	93-4145
v.	)	
MIRAMAX FILM, CORP.	)	
Defendant.	)	

ORDER

AND NOW, this third day of November, 1997, upon consideration of Defendant's Motion for Judgment as a Matter of Law or in the Alternative New Trial, Plaintiff's Response thereto and Defendant's Reply Memorandum, it is hereby ORDERED that, for the reasons set forth in the foregoing Memorandum, the Motion is DENIED.

BY THE COURT:
/S J. CURTIS JOYNER
J. CURTIS JOYNER, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ORSON, INC. d/b/a The Roxy Screening Rooms,	)	CIVIL ACTION
Plaintiff,	)	93-4145
v.	)	
MIRAMAX FILM, CORP.	)	
Defendant.	)	

MEMORANDUM

JOYNER, J. NOVEMBER 3, 1997

Presently before this Court is Defendant, Miramax Film, Corp.'s ("Miramax" or "Defendant"), post trial motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50 or in the alternative for a New Trial pursuant to Federal Rule of Civil Procedure 59. This action was commenced on August 2, 1993 by Orson, Inc. ("Orson" or "Plaintiff"). Plaintiff's second amended complaint alleged three counts: Count I alleged that Miramax violated section 1 of the Shermon Act; Count II alleged that Miramax violated Pennsylvania's "common law doctrine against unreasonable restraint of trade;" and Count III alleged that Miramax violated the Pennsylvania Feature Motion Picture Fair Business Practices Law, 73 P.S. §203-1, et. seq.[1] ("Pennsylvania Act" or "the Act"). This Court granted Miramax's Motion for Summary Judgment as to Counts I and II and granted partial summary judgment as to Count III. See Orson v. Miramax, 862 F.Supp. 1378 (1994). The Third Circuit affirmed the grant of summary judgment as to Counts I and II, but vacated and remanded on Count III. See Orson v. Miramax, 79 F.3d 1358 (1996). At trial, this Court granted Defendant, Miramax's, Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil

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[1] For a more complete procedural history see Orson v. Miramax, 79 F.3d 1358, 1363-65 (3d Cir. 1996).

Procedure 50(a) on plaintiff's claims that Miramax violated sections 203-4 and 203-8 of the Pennsylvania Act. See Trial Transcript 2/27/97, 2). A jury trial followed on the merits of plaintiff's claim that Miramax violated section 203-7 of the Pennsylvania Act. The jury found that Miramax violated section 203-7 of the Act with regard to seventeen (17) Miramax films[2] and awarded damages in the amount of $159,780 to Orson. It is from this judgment that Miramax presently seeks post trial relief. For the following reasons, Miramax's motion is denied.

BACKGROUND

The facts surrounding this case have been described at length in several prior opinions of this Court, Orson, Inc. v. Miramax, Corp., 867 F. Supp. 319 (1994), 862 F.Supp. 1378 (1994), 1994 WL 7708 (1994), 836 F.Supp. 309 (1993), and in the Third Circuit opinion, Orson, Inc. v. Miramax, Corp., 79 F.3d 1358 (1996). Thus, familiarity with these facts is assumed, and they are not repeated here. Rather, we summarize the statutory provisions at issue and the claims of Miramax.

> Section 203-7 of the Pennsylvania Act provides that;
> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theaters within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theaters that would normally be served on subsequent run availability.

73 P.S. §203-7. Orson was able to sustain a claim under this provision after the Third Circuit interpreted the term "within the geographical area" to mean that there must be expansion to second

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[2] The films for which the jury found violations are as follows: "Double Lives of Veronique", "High Heels"; "Enchanted April"; "Reservoir Dogs"; "The Crying Game"; "Passion Fish"; "Strictly Ballroom"; "Like Water for Chocolate"; "Ethan Frome"; "Of Human Heart"; "Farwell My Concubine"; "The Piano"; and "Snapper".

run theaters within the geographic area for which the original license was granted. See Orson, 79 F.3d at 1373-74 (overruling this Court's interpretation of the term "geographic area"); see also Orson, 862 F.Supp. at 1387 (overruled in part Orson, 79 F.3d 1358) (finding that the term geographic area did not mean "increas[ing] market rivalry among direct competitors, but instead [meant] promot[ing] the wide distribution of movies throughout Pennsylvania").

Section 203-10 of the Pennsylvania Act provides a cause of action for violation of any of the statutory provisions. Section 203-10 states:

> "[a]ny exhibitor may bring an action against a distributor or exhibitor or both in the respective court of common pleas wherein the exhibitor's business is located to recover damages sustained by reason of a willful and intentional violation of his [sic] act ...."

73 P.S. §203-10.

Miramax currently seeks judgment as a matter of law or a new trial claiming that the Pennsylvania Act is unconstitutional under the Supremacy Clause of the United States Constitution because it is preempted by the Copyright Act; claiming the Act is unconstitutional under the Commerce Clause of the United States Constitution because it is an undue burden on interstate commerce; claiming there was not sufficient evidence from which they jury could find that Miramax's conduct caused any injury to Orson; claiming that there was insufficient record evidence from which the plaintiff's damages expert could base his damages calculations; and claiming there was not sufficient evidence from which the jury could find that Miramax acted in a willful or intentional manner as required by section 203-10 of the Act. Further, Miramax argues that it is entitled to a new trial because this Court committed errors by admitting any evidence of Miramax' violation of section 203-4 of the Act since that provision of the statute was no longer an issue at trial; claiming that this Court erred in instructing the jury as to the articulated legislative purposes of the Act; and that this Court erred in not instructing the jury what is legally required to find a violation of section 203-7 of the Act. As stated supra, Miramax's motion will be denied.

DISCUSSION

I. Legal Standards for Judgment As a Matter of Law and for

New Trial

A renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) should only be granted if, "'viewing the evidence in the light most favorable to the non-movant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability.'" Coleman v. Kaye, 87 F.3d 1491, 1497 (3d Cir. 1996) (quoting Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993)). However, a mere scintilla of evidence is not enough. Walter v. Holiday Inn, Inc., 985 F.2d 1232, 1238 (3d Cir. 1993). Instead, there must be sufficient "evidence upon which the jury could properly find a verdict for that party." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993) (citations omitted). In making the determination , the court "may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version." Id.

Under Federal Rule of Civil Procedure 59, the standard for granting a new trial is if "the verdict is contrary to the great weight of the evidence or errors at trial produce a result inconsistent with substantial justice." Sandrow v. United States, 832 F.Supp. 918, 918 (E.D.Pa. 1993) (citations omitted). A new trial should only be granted "where a miscarriage of justice would result if the verdict were to stand." Olefins Trading, Inc. v. Han yan Chemical Corp., 9 F.3d 282, 289 (3d Cir. 1993).

II. Judgment As a Matter of Law Pursuant to Rule 50

A. Supremacy Clause: Copyright Act

Miramax argues that it is entitled to judgment as a matter of law because, as applied, section 203-7 of the Pennsylvania Act violates the Supremacy Clause. Specifically, Defendant argues that section 203-7 infringes on rights granted copyright owners by the Copyright Act is, therefore, preempted by the express provisions of the Act. See 17 U.S.C.A. §§106 & 301. Miramax claims that the jury's verdict compels it to "terminate a first run at one theater, such as the Ritz, after 42 days and open another run at a competing theater such as the Roxy." (Def.'s Mem. at 7-8). Miramax further argues that the jury's verdict requires it to license a film to an inferior "subsequent run" theater even if there is no request from such a "subsequent run" theater. This, according to Miramax, constitutes a

compulsory license because "it is the exhibitor demanding the film and the Commonwealth of Pennsylvania, not Miramax, which determine how Miramax' copyrighted materials will be distributed." (Def.'s Mem. at 8). Thus, Miramax claims section 203-7 infringes on the rights granted by the Copyright Act and violates the Supremacy Clause.

Plaintiff responds that the Third Circuit decision in Associated Film Distribution Corp. v. Thornburgh, 800 F.3d 369 (1986) ("Associated Film II") forecloses this argument. For the following reasons, we must agree.

The Copyright Act of 1976, 17 U.S.C.A. § et. seq., gives the owner of a copyright:

> the exclusive right to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

17 U.S.C.A. §106. Further, the Copyright Act specifically provides for preemption of any law infringing upon these rights in 17 U.S.C.A §301, which provides:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106... are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Miramax argues that §301 of the Copyright Act mandates preemption in this case because the finding of the jury amounts to an infringement of Miramax's exclusive right to "distribute copies or

phonorecords of the copyrighted work to the public by sale ... or by rental ... ." See (Def.'s Mem. at 8 & 15 (quoting 17 U.S.C.A. §106(3))).

The Court of Appeals for the Third Circuit has previously been faced with the question of whether 73 P.S. §203-7 is preempted by the provisions of the Copyright Act of 1976 in Associated Film Distribution Corporation v. Thornburgh, 683 F.2d 808 (1982) ("Associated Film I") and Associated Film Distribution Corporation v. Thornburgh, 800 F.2d 369 (1986) ("Associated Film II").[3] In these decisions, the Third Circuit determined that the 42-day provision of the Act is not preempted by the Copyright Act. These decisions effectively foreclose Defendant, Miramax's current argument.

The Third Circuit in Associated Film I determined that the Act was facially valid as it "does not take away from plaintiffs and give to another the right to reproduce the film, to prepare derivative works based on the film, to distribute the film, or to license its performance." 683 F.2d at 816.[4]The court then remanded the case to the district court for a determination of whether, as applied, section 203-7 had an impact on the copyrights.

On remand, the district court held that the Pennsylvania Act, as applied, did not violate the Copyright Act because the effects of the Act on the copyrights wer minimal. The district court held that the effects of section 203-7 were minimal "because [it] interpreted the 42-day provision of the Act as permitting a distributor to enter into a series of exclusive contracts with the same exhibitor as long as no contracts lasted longer than 42 days." Associated Film II, 800 F.2d at 376.

On the subsequent appeal, the Third Circuit in Associated

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[3] In ruling on the validity of the Pennsylvania Act, the Third Circuit noted agreement with the framework of analysis set forth by the district court and adopted by the Sixth Circuit in Allied Artists Pictures Corp. v. Rhodes. The Allied cases involved an Ohio statute similar to the Pennsylvania Act, except it did not include a limiting provision like the 42-day provision of the Pennsylvania Act. See Allied Artists Pictures Corp. v. Rhodes 496 F.Supp. 408 (1980) and Allied Artists Pictures Corp. v. Rhodes, 679 F.2d 656 (1982).

[4] In a footnote, the Third Circuit suggested that "particularly with regard to the 42-day provision, the Pennsylvania Act may have a greater impact upon plaintiffs' copyright rights then the Ohio Act." Id. at 817 n. 12.

Film II, specifically rejected the district court's interpretation that the Act's 42-day provision would allow a series of exclusive contracts. The Third Circuit interpreted the Act's 42-day requirement to mean expansion to a different theater. Id. at 377.

The Third Circuit, thus, never ruled on whether the 42-day provision, as applied, did not violate the Copyright Act because the effects of the Act on the copyrights were minimal. The district court held that the effects of section 203-7 were minimal "because [it] interpreted the 42-day provision of the Act as permitting a distributor to enter into a series of exclusive contracts with the same exhibitor as long as no contracts lasted longer than 42 days." Associated Film II, 800 F.2d at 376.

On the subsequent appeal, the Third Circuit in Associated Film II, specifically rejected the district court's interpretation that the Act's 42 day provision would allow a series of exclusive contracts. The Third Circuit interpreted the Act's 42-day requirement to mean expansion to a different theater. Id. at 377.

The Third Circuit, thus, never ruled on whether the 42-day provision, as applied, violates the Copyright Act. Instead, the court conceded that "[t]here may be merit to the distributor's argument that the 42-day provision, when construed as limiting the distributors' right to license an exclusive run to 42 days, is preempted by the Copyright Act. However, such preemption would be apparent on the face of the statute and cannot be reconciled with the court's earlier decision that the Act is not facially invalid." Id. The court's final pronouncement was that "we are bound to that position." Id.

In a footnote to the Associated Film II decision, current Chief Judge Sloviter stated "[t]he writer of this opinion believes that the 42-day clause is inconsistent with the Copyright Act." Id. at n. 3. Judge Sloviter concluded that the Copyright Act grants the exclusive right to distribute copies if the works to the copyright owner and "[t]hat right encompasses the grant of an exclusive license for a period as long as the copyright owner desires within the term of the copyright." Id. Therefore, Judge Sloviter found the 42-day provision to be inconsistent with the Copyright Act. However, Judge Sloviter was not at liberty to find the Pennsylvania Act unconstitutional due to Internal Operating Procedure 8C of the Third Circuit which "binds subsequent panels to reported panel opinions." Id.

In this case, Orson v. Miramax, 79 F.3d 1358, 1374 (1996), the Third Circuit has held that "§203-7 prohibits a distributor and exhibitor from entering into a license agreement which grants an exclusive first-run for more than 42 days without providing for expansion in the same geographic area covered by the license." Therefore, Miramax is correct in stating that the jury's verdict mandates that Miramax cannot enter into an exclusive license with an exhibitor in Center City[5] for a period in excess of 42 days, without making a provision to expand the film to the "second run" or subsequent run" theater normally served on a subsequent run basis in Center City on the 43rd day. See 73 P.S. § 203-7. This ruling limits the ability of the copyright owner to grant an exclusive run to a 42 day minimum.[6]

Further, as stated *supra*, Miramax is correct that the Third Circuit has not ruled on whether section 203-7 would be inconsistent with the Copyright Act on an as applied basis.[7] However, the argument that defendant is currently making, which is that the 42-day provision of the Act is in violation of the Supremacy Clause because it limits the exclusive rights of distribution given to the copyright owner under the Copyright Act, has already been rejected by the Third Circuit. As discussed *supra*, the Third Circuit in Associated Film II determined that this exact defect would be "apparent on the face" of the statute, however, it has already determined that facially the statute is not inconsistent with the Copyright Act. See Associated Film II, *supra*. In thus holding, the Third Circuit has effectively

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[5] We refer only to Center City here as that is the relevant geographic area to this case.

[6] There is no merit to Miramax' claim that the statute requires them to terminate the movie at their chosen theater in order to comply with this expansion. Miramax could continue to show the film at both theaters. The alleged fact that no Center City theater will play "day and date" with another Center City theater seems to be the choice of Mr. Posel, the owner of the Ritz; it is not mandated by the statute. See (N.T. Direct Exam of R. Posel, 2/27/97, 88: 1-18)(stating he would not play day and date with another center city theater); but see (N.T. Direct Exam of Raab, 2/24/97, 27:2 - 27:20)(stating he suggested to Miramax that they allow him to play the movies at the Roxy day and date with the Ritz). "Day and date" means that no theater will play the same movie on the same day as another theater.

[7] Associated Film II rejected the district court's finding that the act was valid on an as applied basis because they rejected the premise underlying that finding.

foreclosed the ability to bring an as applied challenge on these bases. Therefore, this Court is, just as Chief Judge Sloviter was, bound by the Third Circuit's decision. Accordingly, Miramax's Motion for Judgment as a Matter of Law based on the Supremacy Clause and Copyright Act will be denied.

B. Commerce Clause

Defendant, Miramax, also claims it is entitled to Judgment as a Matter of Law because section 203-7 of the Pennsylvania Act, as applied, violates the Commerce Clause of the United States Constitution. Specifically, Miramax claims that the effect of section 203-7 is to "compel distributors to move their films between theaters within the same zone,"[8] which, Miramax argues, places an unde burden on interstate commerce. (def.'s Mem. at 16). Defendant argues that this is the effect since no theater in Center City Philadelphia will play "day and date"[9] with another theater in Center City. (Def.'s Mem. at 7-8 & n.6). Therefore, Defendant argues, if Miramax is forced to allow another theater in the Center City area to exhibit a film on the 43rd day, they are forced to withdraw the film from the current exhibitor to do so, which constitutes an undue burden on interstate commerce. (Def.'s Mem. at 17).

The Commerce Clause operates as a limitation on the power of states to regulate interstate commerce. Edgar v. Mite, 457 U.S. 624, 102 S.Ct. 2629 (1982). However, not "every exercise of state power with some impact on interstate commerce is invalid." Edgar, 457 U.S. at 640, 102 S. Ct. at 2639. The Court in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844 (1970), articulated the following balance test to determine whether a state's regulation is violative of the Commerce Clause: "where te statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142, 90 S. Ct. at 847.

The Commerce Clause is "aimed at legislation which sets up

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[8] See Orson v. Miramax, 79 F.3d 1358 (3d Cir. 1996) (holding that section 203-7 requires "expansion in the same geographic area covered by the initial license").

[9] See note 6 *supra* for a discussion of the meaning of day and date.

trade barriers blocking or burdening the free flow of commerce between the states." Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408 (S.D. Ohio 1980) (*overruled on other grounds*) Allied Artists Pictures Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982) (citing Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 807, 96 S. Ct. 2488, 2496 (1976)). However, as the Court articulated in Exxon Corp. v. Governor of Maryland, 437 U.S. at 127, 98 S. Ct. at 2214, "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another."

In Associated Film Distribution Corp. v. Thornburgh, 800 F.2d 369 (1986)(Associated Film II), the Third Circuit determined that the 42-day provision of the Pennsylvania Act, as applied, did not violate the Commerce Clause.[10] According to the mandates of Pike, the court first determined that the Act represented legitimate state interests including, but not limited to, "promot[ing] 'the faster dissemination of new films in rural and suburban areas.'" Id. at 372 (quoting district court opinion, 614 F. Supp. at 116). The court also looked to the "Legislative findings and purposes" of the Act and recognized these as legitimate state interests in enacting this legislation. These include:

> 'unabridged access for the public to artistic expression and opinion in feature motion pictures at reasonable prices and at many different locations;' preventing 'unfair and deceptive acts or practices and unreasonable restraints of trade in the business of distribution and exhibition of feature motion pictures;' and preventing 'theaters from unnecessarily going out of business, thereby resulting in reducing the number of small independent businesses and unemployment with loss of tax revenues .'

Id. at 372 (quoting 73 P.S. § 203-2(1), (6), & (9)).

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[10] The court agreed with the district court that facially the act did not violate the Commerce Clause. Id. at 371, n. 1. Therefore, the court analyzed the 42-day provision according to the balancing test articulated in Pike to determine whether, as applied, the provision violated the Commerce Clause.

The Third Circuit then addressed the balancing prong of Pike to determine whether the burden imposed y the act "'is clearly excessive in relation to the putative benefits.'" Id. at 373 (quoting Pike, 397 U.S. at 142, 90 S. Ct. at 847). In applying the balancing test, the Third Circuit specifically upheld the district court's findings that the burdens imposed by the statute were not excessive in relation to the legitimate state interests of Pennsylvania in passing legislation. See Associated Film Distribution Corp. v. Thornburgh, 614 F. Supp. 1100, 1117 (E.D. Pa. 1985) ("Associated Film I").

The district court cited with approval Allied Artists Corp. v. Rhodes, where an Ohio district court, when faced with a Commerce Clause challenge to similar statute, determined that "[t]he Ohio Act does not block or impede the flow of commerce between the states." 496 F. Supp. 408 (S.D. Ohio 1980). The Ohio court reasoned that "the Act has no effect whatsoever on commerce passing through Ohio destined for another state. Nor does it prevent any distributor from entering the Ohio market." Id. at 439. The plaintiff movie distributors in Allied claimed that the Act constituted an undue burden on interstate commerce because it caused "delays in the release of motion pictures, interference with plaintiffs' ability to license with the most desirable theater, and interference with the interstate marketing of motion pictures." In responding to these claims, the Ohio court stated that "'[t]he Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'" Id. at 440 (quoting Exxon, 437 U.S. at 127-28, 98 S. Ct. at 2215). Thus, the court determined that the "'burdens' which the plaintiffs assume under the Act are simply not burdens on the interstate market." Id.

In accepting this reasoning and determining that the Pennsylvania Act does not violate the Commerce Clause, the district court in Associated Film I, determined that even if a distributor chooses not to open a film in Pennsylvania because of the 42-day provision, that is not an adverse effect on interstate commerce. Associated Film Distribution Corp. v. Thornburgh, 614 F. Supp. 1100, 1117 (E.D. Pa. 1985) ("Associated Film I"). Instead, the district court found that the choice of a distributor not to open in Pennsylvania was not even *an effect* of the Act but merely a "marketing strategy." Id/ Further, the court concluded that "[t]he

Commerce Clause does not protect the methods of operation in a retail market.'" Id. (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 98 S. Ct. 2207 (1978)). Therefore, the Third Circuit determined that "[i]n light of the state interests that the district court found advanced by the Act, these burdens are not 'clearly excessive.'" Associated Film II, 800 F.2d at 373. Thus, the constitutionality of the 42-day provision, as applied, was upheld by the Third Circuit under the Commerce Clause scrutiny.

Miramax attempts to distinguish the facts of the instant case from Associated Film II by arguing that as applied to it, the 42-day provision is clearly excessive since the expansion requires them to close the film at one theater in order to open it at another. However, this Court finds defendant's argument is without merit. Miramax's refusal to play "day and date"[11] with another theater in the Center City area is not mandated by the statute, but is instead a creation of theater owners in Philadelphia. See (N.T. Direct of R. Posel 88: 1-18) (stating he would not play day and date with another center city thereafter); but see (N.T. Direct of Raab February 24, 1997, 27:2-27:20) (stating he suggested to Miramax that they allow him to play the movies at the Roxy day and date with the Ritz). As such, the decision by Miramax to honor the Ritz' request not to play "day and date" with another theater and thus to be in a position where in order to show the film at another theater they must close the movie at the current exhibitor, amounts to little more than a "marketing strategy" as discussed by the district court in Associated Film I, 614 F. Supp. at 1117. Therefore the decision by Miramax not to allow the film to play simultaneously with another theater does not represent an undue burden on interstate commerce.

Further, any burden that may be imposed upon Miramax, a single interstate firm, is not an undue burden on interstate commerce since it does not in any way "block or impede the flow of commerce

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[11] The testimony of Mr. Sherry from Miramax suggests that this was not Miramax's policy, but instead was Mr. Posel of the Ritz's policy. However, the end result was that Miramax respected the Ritz's policy and did not allow another theater to play a Miramax film day and date with the Ritz. See (N.T. 2/27/97, Cross of Posel 100: 5-25, 101: 1-25, 102: 1-5 & Cross of J. Sherry 47: 10-25, 48: 1-25, 49: 1-6)

between the states." Allied, 496 F. Supp. at 439. The 42-day provision does not adversely affect the commerce passing through Pennsylvania, nor prevent any movie distributor from entering and doing business in Pennsylvania.

Thus, according to the mandate of the Third Circuit in Associated Film II that the 42-day provision does not violate the Commerce Clause and due to Miramax's failure to produce any evidence of an "excessive burden" on interstate commerce, this Court finds that, as applied to Miramax, section 203-7 does not represent an undue burden on interstate commerce. Defendant's Motion for Judgment as a Matter of law will, therefore, be denied on the Commerce Clause grounds.

C. Sufficiency of the Evidence to prove Causation

Miramax further claims it is entitled to judgment as a matter of law because the evidence at trial was not sufficient to show that any injury suffered by Orson was caused by Miramax' violation of section 203-7. Miramax argues that there was not sufficient evidence for a reasonable jury to find causation on three grounds: 1) there was no evidence that Miramax would have licensed the films at issue to the Roxy if it were not compelled to do so;[12] (2) that with regard to those films that were distributed after August 1993, there can be no showing of causation because Miramax took the Roxy "off service" after the institution of litigation; and (3) that for the films "The Crying Game" and "The Piano," the Roxy could have not demonstrated causation under the statute because those films were "break-out" films that appealed to a larger audience and would, therefore, not have shown at the Roxy. (Def.'s Mem. at 24). Miramax finally claims that for the film "Like Water for Chocolate" the Roxy could not have demonstrated causation as that film was already licensed to the Rittenhouse Theater.

Section 203-10 of the statute requires a showing of a direct causal relationship between the willful and intentional acts of the distributor and the injury suffered by the exhibitor . See 73 P.S. §203-10. This Court finds that, viewing the evidence all reasonable interferences, there was sufficient evidence for the jury to find

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[12] Miramax claims there was not sufficient evidence to show that the Roxy even sought licenses to show the particular films at issue.

causation between the conduct of Miramax and the injury suffered by Orson.

Regarding Miramax's first claim, that they would not have licensed any films to the Roxy without being compelled to do so, plaintiff presented sufficient evidence to establish that during the relevant time frame for which the jury awarded damages it was the *only* "subsequent run" theater normally served by Miramax. See (Pl.'s Trial Exhibit 884 at Exhibit D of Pl.'s Mem.); (N.T. Cross of J. Sherry, 2/29/97, 63:4-25; 64:1-20)(indicating that in 1992 and 1993, the Roxy was the *only* theater in Center city that showed Miramax films on a subsequent run basis). The evidence establishes that in 1992 Miramax licensed 15 films to the Roxy on a second run basis and in 1993 Miramax licensed 4 films to the Roxy on a second basis and that no other Center City theater showed a Miramax film on a second run basis during this time frame. Therefore, there was sufficient evidence from which the jury could find that the Roxy was the subsequent run theater normally served by Miramax during this time frame.[13]

Miramax's claim that Orson could not show causation because there was no indication that the Roxy requested licenses for the films at issue during the relevant time frame, is without merit for several reasons. First, section 203-7 specifically provides that the distributor "shall" make the films available,[14] thus placing the burden on Miramax not on Orson. Notwithstanding the fact that the statute places the burden on Miramax, there was sufficient evidence from which the jury could infer that the Roxy tried to license the films at issue from Miramax during this time frame. The testimony of Mr. Raab, the owner of the Roxy, indicated that he instructed his buyer to obtain any and all Miramax films either on a first run or second

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[13] Although Mr. Sherry, who is a current Miramax employee, testified that he would have tried to place the film at theaters other than the Roxy, there was no evidence that this would have been the policy of Miramax during the relevant time frame.

[14] Miramax claims that such reading of the statute would render the statute unconstitutional as it would constitute a violation of the Supremacy Clause and the Copyright Act. However, as the issue has been resolved against Miramax by the mandates of the Third Circuit, that argument has no merit with regard to the sufficiency of the evidence.

run basis–whatever they could get. (N.T. Direct of Raab, 2/24/97, 26: 10-25). Further, Raab testified that he tried to obtain Miramax films by instructing his buyer to: a) offer more money than anyone else in Center City; b) suggest to Miramax that they allow the Roxy to play day and date with the Ritz; and/or c) suggest to Miramax that they give the Ritz a two week head start on a film and then allow the Roxy to begin showing the film day and date with the Ritz. (N.T. Direct of Raab, 2/24/97, 27: 5-19).

Jeffrey Jacobs, the buyer for the Roxy, testified that he tried to no avail to obtain films from Miramax for the Roxy. (N.T. Direct of J. F. Jacobs, 2/25/97, 75-86). This testimony, coupled with the testimony of Mr. Zeidman from Miramax and Mr. Posel from the Ritz that the Ritz would continue to play a film until it was no longer financially viable to do so, and the fact that Miramax honored the Ritz' request not to play day and date with any other theater, present sufficient evidence from which a jury could conclude/infer that the Roxy did attempt to obtain a license for the films at issue. See (Pl.'s Mem. at 26-27). Further, there was sufficient evidence for the jury to conclude that the practice in the industry was to make requests for films by phone, and, therefore, there was no need to have written evidence that the Roxy desired to license these films. See (N.T. Direct of J.F. Jacobs, 2/25/97, 93: 9-15).

Miramax's second claim that the Roxy could not show causation for the two films that played after they took the Roxy "off service" is not supported by the statute. As stated *supra* Orson has established that it was the subsequent run theater normally served during the time frame, and there is nothing in the statute to indicate that Miramax could avoid this obligation by taking the Roxy "off service" after the institution of litigation. See 73 P.S. §203-7.

Regarding the films "The Crying Game" and "The Piano," there was sufficient evidence for the jury to conclude that the Roxy would have exhibited these films if they were available to them. As stated supra, the Roxy sufficiently established that they were the subsequent run theater normally served, as required by section 203-7 of the Act. Therefore, regardless of Miramax's conjecture that due to the success of the films the Roxy would not have obtained a license to exhibit them had the films been expanded, there was

sufficient evidence for the jury to conclude that had Miramax complied with section 203-7 of the Act and expanded to the subsequent run theater normally served, that the films would indeed have gone to the Roxy. Further regarding "Like Water for Chocolate," which Miramax claims could not be shown at the Roxy because it was licensed to be shown at the Rittenhouse, plaintiff is correct in noting that the Rittenhouse did not show the film until one year after the date the film would have been available for a subsequent run as required by the statute. see (Pl.'s Mem. at 30).

Therefore, there was sufficient evidence on the record for a reasonable jury to find that Miramax caused the injury to Orson as required by section 203-10. Accordingly, Miramax's Motion for Judgment as a Matter of Law on these grounds is denied.

D. Sufficiency of Evidence to Show a willful and Intentional Violation of 203-7

Miramax also makes a Motion for Judgment as a Matter of Law based on the fact that section 203-10 of the statute requires a showing of willful and intentional behavior. Miramax claims that there is insufficient evidence from which a jury could conclude that they willfully and intentionally violated the statutory provisions since they introduced evidence that they did not understand the meaning of the terms of the statute. See (Def.'s Mem. at 25). Miramax claims that it interpreted the term geographical area to mean that on the 43rd day, they must expand to the suburbs/rural areas surrounding Center City, not to another theater within Center City.[15] Thus, Miramax argues that it thought it was in compliance with the statute. Further, Miramax claims that with regard to the ten (10) films for which it sen trade notices to Orson, the responsibility for asking for the film was on the exhibitor, so it could not have willfully and intentionally violated the statute with regard to those films. See (Def.'s Mem. at 27).

Whether Miramax had the appropriate state of mind to be found liable for an intentional and willful violation of the Pennsylvania Act is a factual question that is appropriate for the jury

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[15] But see Miramax v. Orson, 79 F.3d 1358, 1374 (3d Cir. 1996) (determining that Pennsylvania Act requires expansion within the Center City area).

to decide. See Riehl v. Travelers Ins. Co., 772 F.2d 19 (3d Cir. 1985). In the instant case this especially so as the jury had to make a finding of Miramax's state of mind from interferences from the evidence presented. See Id. at 24.

This Court finds that there was sufficient evidence on the record for the jury to make the determination that Miramax acted in a willful and intentional manner. The jury was presented with the deposition testimony of Robert and Harvey Weinstein, who are the co-chairmen of Miramax, and Martin Zeidman, head of domestic distributions for Miramax during the relevant time frame, to indicate the state of mind of Miramax. Further the jury was presented with evidence of Miramax's violation of section 203-4, another provision of the statute, from which a reasonable jury could infer that the violations of section 203-7 were not inadvertent.

Accordingly, this Court concludes that there was sufficient evidence from which the jury could find that Miramax acted willfully and intentionally in not expanding the films within the geographic area.

E. Sufficiency of Evidence to Show Damages Claim

Miramax further claims it is entitled to judgment as a matter of law because the evidence presented by plaintiff's expert, Mr. LaRosa, was not sufficient to sustain a finding of damages in the amount awarded by the jury. Miramax's specific complaint is that LaRosa's testimony was based on assumptions not supported by facts in the record. Miramax claims LaRosa made the following unsupported assumptions: 1) "he [LaRosa] assumed that every film that, hypothetically, would have shifted from the Ritz to the Roxy on the 43rd day would have played at the Roxy for the same amount of time as that film actually played at the Ritz" and 2) that "Mr. LaRosa assumed that every patron that saw the film at the Ritz during its run would have come to the Roxy to see the film in his hypothetical world." (Def.'s Mem. at 29). Defendant argues that these faulty assumptions led to an unreliable damages calculation.

"[T]he calculation and assessment of damages is a question of fact that is reserved for the jury." Medcom Holdgin Co. v. Baxter Travenol Laboratories, 106 F.3d 1388, 1400 (7th Cir. 1997). The jury is not bound by expert testimony presented in the case. See Weil v. Seltzer, 873 F.2d 1453, 1466 (D.C. Cir. 1989). Instead, "[t]he

evaluation of the experts' opinions and the application of evidence as to their underlying assumptions, [are] matters for the jury." Crues v. KFC Corp., 729 F.2d 1145, 1151 (1984). "The factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." Loudermill v. Dow Chemical, 863 F.2d 566 (8th Cir. 1988). However, expert testimony cannot be based on sheer speculation or conjecture; that is, it cannot be "so fundamentally unsupported that it can offer no assistance to the jury." Id.

After a thorough review of the record, this Court concludes that LaRosa's testimony is not "so fundamentally unsupported that it can offer no assistance to the jury." There is sufficient evidence on which LaRosa could base his numerical calculations. LaRosa based his assumption on the length of time the film would play at the Roxy and on the number of film-goers who would come to the Roxy to see the film on the record of evidence as follows: 1) the testimony of Max Raab, Jennifer Steinberg, and Judith Freidman that arts film viewers in Philadelphia would go to any theater playing the film to see it; 2) the testimony of Mr. Posel who indicated he would not play day and date with another theater because it would be the same consumer base, which indicates that the same viewers who saw a film at the Ritz would see the film at the Roxy; and 3) the record evidence that the Roxy was the only other art film theater in Center City besides the Ritz. See (Pl.'s Mem. at 38). This evidence provides a basis for the expert's conclusion that the film would have played as long at the Roxy as it did at the Ritz and that the same number of film viewers would have seen the film at the Roxy as saw it at the Ritz.

Further, Miramax had ample opportunity, which was utilized, to demonstrate any defects in LaRosa's calculations on cross examination. It is clear from the verdict of the jury that LaRosa's calculations were not adopted in toto;[16] rather, the jury awarded a lesser amount based on their own findings of fact and presumably based on the opinions of both plaintiff's and defendant's expert.

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[16] LaRosa estimated the Roxy's losses to be $519,362. (N.T. Direct of LaRosa, 3/3/97, 48: 3-15). The jury awarded $159,780.

As there was sufficient evidence in the record on which LaRosa could base his opinion, Miramax's Motion for Judgment as a Matter of Law or a New Trial based on the admission of LaRosa's testimony is denied.

II. Motion for a New Trial Pursuant to Rule 59

A. Allowing Evidence of 203-4 Violation

Miramax also request a new trial due to this Court's alleged error in admitting evidence of Miramax's violation of section 203-4 of the Pennsylvania Act.[17] Miramax claims that since this Court granted their Rule 50(a) Motion for Judgment as a Matter of Law concerning section 203-4, that this Court should not have allowed any evidence of the violation of that statutory provision. (Def.'s Mem. at 32).

Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This rule is read in conjunction with Federal Rule of Evidence 403 which provides:

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In order to admit evidence of violations not at issue in the case but that meet the exception as outlined in 404(b), there must be a balancing to ensure that the probative value is not outweighed by the prejudicial value of the evidence. See United States v. Lebovitz, 669 F.2d 894 (3d Cir. 1982).

This Court determined at trial and affirms here that as the probative value outweighed the prejudicial value, admission of

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[17] Section 203-4 is the provision of the statute regulating trade screenings. 73 P.S. §203.4.

evidence of a violation of 203-4 was proper to show the intent and state of mind of defendant. See (Trial Transcript, 2/28/97, 2-6: 28-29, 140-42). Therefore, defendant's Motion for a New Trial due to admission of this evidence is denied.

B. Jury Instructions

Defendant further claims they are entitled to a new trial due to this Court's instruction to the jury concerning the legislative purposes articulated in the Pennsylvania Act. See "Legislative findings and purposes," 73 P.S. §203-2. Miramax claims that the actual language of section 203-7 of the statute should have controlled the jury's deliberation and that allowing the jury to consider the articulated legislative purposes took that obligation away from the jury. (Def.'s Mem. at 33).

The trial transcript indicates that this Court fully and explicitly made apparent to the jury what section 203-7 requires. Each element of section 203-7 was described in detail, and the jury could not have been confused as to its function in determining whether section 203-7 had been violated. See (Trial Transcript, Instructions to Jury, 2/28/97), 18-28). Given this, there are no grounds for a new trial based on admission of this evidence. There will be no miscarriage of justice if the verdict is allowed to stand.

Defendant further claims they are entitled to a new trial because this Court did not fully explain to the jury "what is legally required to find a violation of section 203-7." (Def.'s Mem. at 33). Defendant claims that this Court's failure to instruct the jury that 1) Orson had to prove it requested films from Miramax after the 42nd day and 2) Orson had to prove that Miramax entered into an exclusive agreement for showing the film for more than 42 days constituted error of such proportions that they must now be granted a new trial. (Def's Mem. at 33-34).

After a through review of the record, this Court finds that Miramax's claims are without merit. The language of the statute in no way indicates that Orson must show that it specifically requested the films at issue.[18] Instead, the statute puts the onus on the

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[18] However, see the discussion supra concerning the sufficiency of the evidence to prove causation under the statute. This discussion shows that Orson did indeed establish that it wanted each of the films for which the jury found liability.

distributor to make the films available to the subsequent run theater normally served. Accordingly, to have instructed the jury that Orson had to prove it requested the films would have been erroneous. Further, this Court did instruct the jury that they must find that Miramax entered into an exclusive agreement to show the film in excess of 42 days. See (Trial Transcript), 2/28/97, 20: 12-22, 21: 20-25, 22: 1-6, 24: 9-17, 24-26: 23-25, 1-5, 27-28, 23-25, and 1-2). Thus, Miramax's motion for a new trial based on these instructions will be denied.

VII. Conclusion

An appropriate Order follows.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1994

ORSON, INC. t/a ROXY SCREENING ROOMS
v.
MIRAMAX FILM CORP.
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 93-cv-04145)
(District Judge: Hon. J. Curtis Joyner)

Argued: September 17, 1998

Before: SLOVITER, SCIRICA and ALITO, *Circuit Judges*

(Filed April 27, 1999)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

I.

INTRODUCTION

Section 106 of the Copyright Act provides that, subject to certain exceptions inapplicable here, the owner of a copyright has:

> the exclusive rights to do and to authorize any of the following:
>
> . . .
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; [and]
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.

17 U.S.C. § 106.

Another section of the same statute provides:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301.

Section 203-7 of the Pennsylvania Feature Motion Picture Fair Business Practices Law (the "Pennsylvania Act") provides that:

> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

73 Pa. Cons. Stat. §203-7.

Appellant Miramax Film Corp., a motion picture production and distribution company, appeals the District Court's failure to overturn a jury's award of damages of $159,780 to plaintiff Orson, Inc., the owner of a Center City Philadelphia (referred to as "Center City") movie theatre, for Miramax's violation of section 203-7 of the Pennsylvania Act by entering into an exclusive first-run exhibition agreement for more than forty-two days with another Center City theatre. *See Orson, Inc. v. Miramax Film Corp.*, 983 F. Supp. 624 (E.D. Pa. 1997). Miramax argues for reversal on the ground, *inter alia*, that the Pennsylvania Act is preempted because it interferes with a copyright holder's authority to exercise its exclusive rights to license the work. Before we can address this provocative legal issue, we must first consider Orson's argument that this court has already decided this issue contrary to Miramax's position and that we are bound to reject Miramax's preemption argument by the law of the case doctrine and our own binding precedent.

II.

FACTS AND PROCEDURAL HISTORY

This is the second time the parties are before this court in this case. The facts are presented in detail in our first opinion which followed the District Court's grant of summary judgment in favor of Miramax. *See Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3rd Cir. 1996) ("Orson I"). Nonetheless, we recount the facts necessary for the issue presented here.

Miramax distributes art films nationally, including in

Philadelphia and the surrounding metropolitan area. The parties have not attempted to define "art films" other than as we previously did by contrasting them with "movies that may be characterized as 'commercial' or 'mainstream.'" *Id.* at 1362. Only a limited number of theatres in any area exhibit art films. Orson showed primarily second-run art films from January 1992 through October 1994 through the Roxy Screening Rooms, a Center City movie theater with two screens. The first runs of Miramax's art films were shown in Center City at the Ritz Theaters, a pair of theaters with five screens each, the Ritz Five and the Ritz at the Bourse (collectively, the "Ritz"). During its two and one-half years of operation by Orson, the Roxy received only one first-run movie from Miramax, and rarely received second-run movies after the forty-second day of play at the Ritz, despite repeated requests.

In August 1993, Orson filed suit against Miramax, charging that Miramax's distribution of films, specifically in its dealings with the Ritz, violated the Sherman Act, the Pennsylvania common law tort of unreasonable restraint of trade, and section 203-7 of the Pennsylvania Act. The District Court granted Miramax's motion for summary judgment as to both Orson's federal and state antitrust claims. It also granted summary judgment to Miramax as to Orson's claim under section 203-7 of the Pennsylvania Act for nine of the fifteen films at issue because it construed that provision as satisfied by Miramax's expansion of the distribution of those films to suburban theaters before the forty-third day of their runs at the Ritz; by agreement of the parties, it dismissed without prejudice Orson's claim as to the six remaining films. *Orson, Inc. v. Miramax Film Corp.*, 862 F. Supp. 1378 (E.D. Pa. 1994). Orson appealed.

This court affirmed the grant of summary judgment to Miramax on the antitrust claim and the restraint of trade claim. *Orson I*, 79 F.3d at 1358. The principal portion of our opinion was directed to analyzing how the legal principles regarding restraint of trade applied to the arrangement by which Miramax granted the Ritz an exclusive license to exhibit its first-run films. We concluded that "Orson failed to present sufficient evidence to support its claim that the Miramax-Ritz clearances were unreasonable restraints of trade." *Id.* at 1372.

On the other hand, we vacated the judgment for Miramax on

Orson's claim under the Pennsylvania Act because we determined that the District Court had erred in its interpretation of section 203-7. The District Court had construed the statutory requirement that a distributor, such as Miramax, expand the run of the film after forty-two days to other theaters in the "geographical area" to have been satisfied by Miramax's expansion to suburban theaters. We held, in the absence of any applicable opinion by the Pennsylvania Supreme Court, that the relevant geographical area for purposes of section 203-7 was the same area covered by the license, i.e., Center City Philadelphia. Because the record was disputed or incomplete, we remanded for further proceedings as to whether Miramax's actions as to those films violated section 203-7 of the Pennsylvania Act. *Id.* at 1374-75.

On remand, the case proceeded to a jury trial, and the jury awarded Orson damages of $159,780. *See Orson, Inc.*, 983 F. Supp. at 626. The District Court denied Miramax's post-trial motions. The court held that Orson had presented sufficient evidence to establish that Miramax had caused the injury, that Miramax acted willfully and intentionally, and that the damages were proper. *Id.* at 634-36.

Additionally, the District Court rejected Miramax's challenge to the constitutionality of section 203-7. The court concluded that Third Circuit precedents had decided the question of the facial validity of the Pennsylvania Act; moreover, those same precedents "effectively foreclosed" an as-applied challenge. *Id.* at 630.

Miramax filed a timely notice of appeal. It argues that section 203-7 is unconstitutional on its face and as applied, that the finding of willful and intentional violation is erroneous as a matter of law, and that there was no evidence to support the assumption that the Roxy (Orson's theater) would have exhibited the films after forty-two days. We have jurisdiction pursuant to 28 U.S.C. § 1291.

III.

EFFECT OF PRIOR DECISIONS

We engage in plenary review of a Motion for Judgment as a Matter of Law and apply the same standards as the district court. *See Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3rd Cir. 1993). Where the issue involves purely a question of law, such as federal preemption, we review the decision of the district court *de novo*. *See Espinal v. Northwest Airlines*, 90 F.3d 1452, 1455 (9th

Cir. 1996). However, Orson contends that we are foreclosed from examining the legal issue presented because of the law of the case doctrine and the holdings of our prior decisions.

A. *Law of the Case*

Orson's reliance on the law of the case doctrine need not detail us long. This doctrine precludes a court from reconsidering "issues previously resolved by an earlier panel" in the same case. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 112 F.3d 652, 663 (3rd Cir. 1997); *see also United States v. Local 560 (I.B.T.)*, 974 F.2d 315, 329 (3rd Cir. 1992) ("When an appellate court decides a legal issue, that decision governs all subsequent proceedings in the same case."). As we stated in *Schultz v. Onan Corp.*, 737 F.2d 339, 345 (3rd Cir. 1984), "[T]he law of the case doctrine applies 'to issues that were actually discussed by the court in the prior appeal [and] to issues decided by necessary implication." Miramax argues that there was no such discussion the first time this case was before us.

Orson's law of the case argument is predicated on a footnote in *Orson I* stating that this court had already rejected a facial preemption challenge to section 203-7. *See* 79 F.3d at 1373 n.14. However, an examination of *Orson I* shows plainly that it did not resolve the legal issues regarding preemption that Miramax raises on appeal.

As we noted at the outset, *Orson I* was an appeal by Orson from the District Court's grant of summary judgment to Miramax in Orson's suit alleging that Miramax violated the federal antitrust laws, engaged in restraint of trade and violated section 203-7 of the Pennsylvania Act. *See Orson Inc*, 862 F. Supp. at 1381. On appeal, after we considered and affirmed the grant of summary judgment on the antitrust and restraint of trade counts, we turned to Orson's claims based on section 203-7. Because the District Court had not construed section 203-7 to require expansion after forty-two days in Center City, we remanded for further proceedings because the summary judgment record was either "disputed or incomplete in critical respects." *Id.* at 1374.

There is no indication in the opinion that we focused on the possibility that we could have avoided the remand if we had decided that the Copyright Act preempted section 203-7. At most, we rather summarily read our prior case law regarding section 203-7 as having

decided that issue. We noted Miramax's contention that the federal Copyright Act would preempt section 203-7 if the Act "were interpreted this way," *id.* at 1373 n.14, but because we believed that we had previously rejected a facial challenge on that ground in two prior cases, *see Associated Film Distrib. Corp. v. Thornburgh* ("AFD I"), 683 F.2d 808 (3rd Cir. 1982), and *Associated Film Distrib. Corp. v. Thornburgh* ("AFDI II"), 800 F.2d 369 (3rd Cir. 1986), we did not discuss it further. *Orson I*, 79 F.3d at 1373 n.14. Therefore, because the preemption issue was neither actually discussed nor necessarily decided by implication in *Orson I* -- the only prior decision to which the law of the case doctrine might arguably apply -- we hold that doctrine inapplicable here.

Therefore, we turn to consider Orson's argument that our precedents on the preemption issue now foreclose our review of Miramax's preemption claim.

B. *Third Circuit IOP 9.1*

Orson argues that this court decided in AFD I that section 203-7 was not preempted by the federal Copyright Act, and that therefore we are bound to that decision by our Internal Operating Procedure ("IOP") 9.1.[1] That IOP reflects this court's commitment to "maintain a consistent body of circuit jurisprudence." *A.C.L.U. of New Jersey v. Schundler*, 1999 WL 77766 at *24 n.6 (3rd Cir.1999).

The complaint in AFD I was filed shortly after the passage in 1980 of the Pennsylvania Act. That Act comprehensively regulates several aspects of the licensing, distribution, and exhibition of films. It requires blind bidding by theaters, outlines specific procedures for that bidding, prohibits advances, and strictly curtails minimum guarantees. *See* 73 Pa. Cons. Stat. §§203-1-203-6. It also includes the section at issue here, which provides that no license agreement between a distributor and an exhibitor can grant an exclusive first run for more than forty-two days without provision to expand the run to second-run or subsequent-run theatres within the geographical area. *See* 73 Pa. Cons. Stat. § 203-7. Finally, the Act

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[1] IOP 9.1 states: "It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court in banc consideration is required to do so."

creates private causes of action by exhibitors against distributors for violations of its provisions. *See* 73 Pa. Cons. Stat. § 203-10. The Pennsylvania courts have never interpreted the Act's provisions.

The plaintiffs AFD I, movie distributors and producers, filed a motion for declaratory judgment in the United States District Court for the Eastern District of Pennsylvania challenging the entire statutory scheme on various grounds. The District Court granted summary judgment to plaintiffs on all their claims. *See Associated Film Distrib. Corp. v. Thornburgh*, 520 F. Supp. 971, 996 (E.D. Pa. 1981). The court held that the Pennsylvania Act violated both the First Amendment by indirectly restraining dissemination of protected expression, *id.* at 991, and the Supremacy Clause because it was preempted by the federal Copyright Act. *Id.* at 995-996.

In reaching the latter conclusion, the district court held that certain provisions of the Pennsylvania Act, such as those prohibiting advances, prohibiting guarantees in percentage leases, requiring advance screenings, and requiring certain bidding procedures, interfered with the essence of the copyright grant because the provisions "substantially restrict the conditions under which a copyright holder may distribute and license its work." *Id.* at 994. The district court recognized that an Ohio district court had upheld the constitutionality of a similar, but not identical, Ohio statute. *See* Ohio Rev. Code Ann. §§ 1333.05-07 (Baldwin 1998). Nonetheless, the district court in AFD I, emphasizing the differences between the Pennsylvania and Ohio laws, viewed the Pennsylvania Act's "broad and comprehensive regulation" to conflict with the federal objectives of the Copyright Act. 520 F. Supp. at 995. The court also concluded that the requirement in section 203-7, requiring that "[a]fter 42 days the film must be reoffered for licensing and the run must be 'expanded,'" interfered with the copyright holder's freedom to license. *Id.* at 994-95.

On appeal, this court reversed. AFD I, 683 F.2d at 817. In our discussion, we relied essentially on the analysis detailed both in the Ohio district court opinion reviewing the Ohio statute and in the Sixth Circuit's opinion on appeal. *See Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd in relevant part and remanded in part*, 679 F.2d 556 (6th Cir. 1982). With respect to

the First and Fourteenth Amendment claims,[2] we quoted extensively from the Ohio district court opinion, which had rejected the First Amendment challenge, but we stated that because the trial court here had granted summary judgment, it was not able to evaluate the actual impact of the Act, if any, on First Amendment values, it could not assess the weight of the state's concerns, and it could not make the necessary balance between the distributor's protected rights and the nature and weight of the state's concerns. AFD I, 683 F.2d at 813-14. Accordingly, we remanded the case so that the district court could apply the standards articulated in the Ohio cases to the Pennsylvania Act.

We also decided that the court should not have granted summary judgment on the copyright preemption claim. Again, we relied almost exclusively on the analysis used by the Ohio district court and the Sixth Circuit, which had rejected the similar contentions made there. *Id.* at 816.

It is significant (and overlooked in our prior opinions) that the Ohio district court, in deciding that the Ohio statute did not create, grant or destroy any rights that are "equivalent" to the exclusive rights of the federal Copyright Act, stated, "Indeed, by providing procedures for the licensing of a film, the Act recognizes *sub silentio* the right of the copyright owner to exhibit the motion picture and to grant an exclusive or restrictive license to others to exhibit it." *Allied Artists Pictures*, 496 F. Supp. at 443. The Sixth Circuit agreed with this language, *see* 679 F.2d at 663, and we quoted it verbatim in AFD I. 683 F.2d at 814-15 n.11. However, as with the First Amendment issue, we concluded that the trial court should not have reached its decision on summary judgment, and we remanded the preemption issue, noting that although the Act on its face contains no threat to the copyrights themselves:

> The question of whether and to what extent the Pennsylvania Act interferes with attaining the "purposes and objectives of Congress" is one which must be resolved *before the trial*

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[2] Although the District Court's opinion referred exclusively to the First Amendment, it is established that the Fourteenth Amendment applies the provisions of the First Amendment to the states. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996).

> *court can decide, as a matter of law*, whether the interference (if any) is such as to require invalidation of all or part of the Pennsylvania Act on preemption grounds.

Id. at 816 (emphasis added).

We emphasize that the Ohio statute did not have any limitation on the length of the first run, that the Ohio court on which we relied in AFD I stated tha6t the Ohio statute *sub silentio* recognized the copyright owner's right to grant an exclusive license to exhibit the film, and that our opinion in AFD I quoted that language about the copyright owner's right to grant an exclusive license to exhibit the film.

As the foregoing discussion makes clear, at most AFD I remanded the legal decision with respect to the 42-day rule, along with the provisions of the Act that we actually discussed in the opinion, so the district court could determine "whether and to what extent the Pennsylvania Act interferes with attaining the 'purposes and objections of Congress.'" *Id.* at 816. That we did not decide the preemption issue is evident from the statement in the same sentence that this question "is one which must be resolved before the trial court can decide, *as a matter of law*, whether the interference (if any) is such as to require invalidation of all or part of the Pennsylvania Act on preemption grounds." *Id.* (emphasis added). If we had decided the copyright preemption issue as a matter of law, there would have been no reason to remand for the trial court to decide the same preemption issue as a matter of law. Indeed, the most direct statement in AFD I regarding section 203-7 -- "particularly with regard to the 42-day provision, the Pennsylvania Act may have a greater impact upon plaintiffs' copyright rights than the Ohio Act," *id.* at 816 n.12 -- suggests a potential preemption problem with that section.

Surprisingly for a decision on which all the later cases depend, the 42-day rule is never discussed or analyzed in AFD I, undoubtedly because the Ohio statute under discussion in the Ohio district court and the Sixth Circuit opinions on which we relied did not have any comparable provision. Moreover, we cannot regard our decision in AFD I as a legal determination on the preemptive effect of the Copyright Act on section 203-7 because the construction of the requirements imposed by section 203-7 was first given in *Orson I*,

fourteen years after AFD I. Before that case, the district judges had different understandings of the language of that section. *See Associated Film Distrib.*, 520 F. Supp. at 994-95 ("After 42 days, the film must be reoffered for licensing, and the run must be 'expanded.'"); *Associated Film Distrib.*, 614 F. Supp. at 1123-24 ("The statute does not prevent distributors from contracting for runs longer than six weeks. . . . The statute also does not prevent a distributor from entering into a series of exclusive licenses with exhibitors as long as each license does not exceed 42 days."); *Orson, Inc.*, 862 F. Supp. at 1387 (Requirement for expansion after 42 days satisfied because several of the films under consideration "'expanded' to other Philadelphia area theaters, outside of Center City Philadelphia, before the 42 day period expired."). It was not until we reversed the District Court's decision in *Orson I* that this court provided our definitive construction of section 203-7, *viz.*, that it required the copyright holder to expand its license to another exhibitor within the same geographic area, that is, Center City.

In case after case, courts commented on the vague and uncertain meaning of the statutory language. *See, e.g., Associated Film Distrib.*, 614 F. Supp. at 1111 ("this part of the statute [section 203-7] was inartfully drafted, and distributors interpret its requirements differently"); *Orson, Inc.*, 862 F. Supp. at 1387 (characterizing statute's wording as "sufficiently vague" to permit alternate readings). It would be stretching for us to hold IOP 9.1 applicable in these circumstances. *See, e.g., Connors v. Beth Energy Mines, Inc.*, 920 F.2d 205, 211 n.7 (3d Cir. 1990)(holding IOP 9.1 inapplicable when prior decision predicated on a different record).

Orson may have been misled because we also fell into the same error regarding the precedential effect of AFD I in two later decisions. After the remand in AFD I, the district court, after a six-week bench trial, issued its Findings of Fact and Conclusions of Law in which it upheld the constitutionality of the Pennsylvania Act against all challenges. *See Associated Film Distrib.*, 614 F. Supp. at 1125. This time the distributors appealed, arguing that the Act violated the Commerce Clause (a claim not made in AFD I), violated the First Amendment, and violated the Supremacy Clause because of preemption by the Copyright Act. We rejected the distributors' claims, and affirmed. AFD II, 800 F.2d at 369.

With respect to the copyright preemption issue, we stated that in AFD I we had "conclusively established that the Pennsylvania Act was not facially preempted by the Copyright Act," AFD II, 800 F.2d at 375, and construed our remand to have been for a factual determination by the District Court whether in actual operation the Act prevented or interfered with federally created rights. *Id.* at 376. We noted that the distributors contended that "the limitation on the length of exclusive runs to 42 days interferes with the copyright owner's right to license exclusively for the life of the copyright," *id.*, and we disagreed with the district court's construction of this provision to mean that the act "permitt[ed] a distributor to enter into a series of exclusive contracts with the same exhibitor as long as no contract lasted longer than 42 days," *id.* (citing 614 F. Supp. at 1123-24). In doing so, we reiterated that the language required the distributor "'to expand the run to second run or subsequent run theatres within the geographical area.'" *Id.* at 377 (quoting 73 P.S. §203-7) (emphasis in opinion). Thus, although we rejected the district court's interpretation of the Act and emphasized the importance of the term "expand" in doing so, we offered no further opinion as to what the Act affirmatively required.

We recognized "[t]here may be merit" to the preemption issue raised by the distributors but believed our prior opinion in AFD I decided the Pennsylvania Act is not facially invalid. *Id.* at 377. The writer of that opinion (coincidentally the write of this opinion) opined that "the 42-day clause is inconsistent with the Copyright Act," *id.* at 377 n.3, but also believed we were bound by our prior opinion.

As we have demonstrated above, we did not decide the issue whether the 42-day rule is preempted by the Copyright Act in AFD I. This writer concedes she erred in so stating in AFD II. As has been said and oft-repeated, "Wisdom too often never somes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Bank*, 335 U.S. 595, 600 (1949)(Frankfurter, J., dissenting). In any event, it is apparent that our opinion in AFD II cannot be the basis for application of IOP 9.1 because the issue was not actually decided there. And, as we explained earlier in this opinion, in *Orson I* we relied on the statement in AFD II that the issue had been decided in AFD I.

Accordingly, we believe that Orson is incorrect in arguing that the issue of the preemption of section 203-7 as now construed has previously been decided by this court. We turn now to that issue.

IV.

PREEMPTION

The Supreme Court has recognized three ways in which federal law may preempt, and thereby displace, state law: (1) "express preemption," (2) "field preemption" (which is also sometimes referred to as "implied preemption"), or (3) "conflict preemption." *See Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983); *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987). Express preemption arises when there is an explicit statutory command that state law be displaced. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992). An example of express preemption can be found in the subsection of the Employee Retirement Income Security Act of 1974, stating that the provisions of that Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

Under field- or implied-preemption principles, state law may be displaced "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cippolone v. Leggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted).

Finally, state law may be displaced under conflict-preemption principles if the state law in question presents a conflict with federal law in one of two situations: when it is impossible to comply with both the state and the federal law, *see Pacific Gas*, 461 U.S. at 204, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Jones v. Rath Packing, Co.*, 430 U.S. 519, 525 (1977).

As the Court has noted, these categories are not necessarily air-tight. *See English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)("By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption; A state law that falls within a pre-empted field conflicts with Congress' intent (either

express or plainly implied) to exclude state regulation.").

The Copyright Act contains an express preemption provision in § 301, which states, in relevant part:

> On and after January 1, 1978, *all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright* as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, *are governed exclusively by this title*. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a)(emphasis added). The exclusive rights in the copyrighted work granted by the Act are reproduction; preparation of derivative works; distribution by sale, rental, lease or lending; public performance, in the case of motion pictures or audiovisual works; and public display of individual images from motion pictures or audiovisual works. 17 U.S.C. 106.

State laws, whether statutory or common law, are subject to express preemption under Copyright Act § 301 only if they create rights that are "equivalent" to the exclusive rights within the general scope of copyright. *See* 17 U.S.C. § 301(a); *see also Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1986)(because literary works, including compilations and derivative works, are within the subject matter of copyright, state common law that purported to protect a work for which plaintiff's copyright action was unsuccessful was preempted); 1 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 1.01[B][1](1998)(discussing various state law causes of action).

As noted above, conflict preemption may arise either because "'compliance with both regulations is a physical impossibility' or because the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Jones*, 430 U.S. at 525; *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The purposes and objectives of Congress, which appear in the Copyright Act, are to implement a nationally uniform system for the creation and protection of rights in a copyrighted work. *See Goldstein v. California*, 412 U.S. 546, 561 (1973)(turning "to federal

copyright law to determine what objectives Congress intended to fulfill").

An illustration of conflict preemption under the Copyright Act is provided by *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710-11 (1984). That case concerned an Oklahoma state law that banned advertising of alcoholic beverages by cable operators. However, the Copyright Revision Act of 1976 established a program of compulsory copyright licensing under the regulations of the Federal Communications Commission (FCC) pursuant to which a cable operator could transmit signals out of state upon payment of service royalties. The Supreme Court held the Oklahoma law preempted, not only because the FCC had explicitly preempted the area, but also because the state law would destroy or interfere with the exercise of a federally created copyright right. *Id*. at 710-11; *see also* 1 Nimmer & Nimmer, *supra*, § 1.01[B][3]. *Cf. Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1534 (M.D. Ala. 1992)(city ordinance requiring cable programming provider to license programs to additional entities unconstitutional through either § 301 or conflict preemption).

In this case, Miramax argues both express preemption and conflict preemption. In the case before us, we might be able to apply both express preemption and conflict preemption but because our analysis more closely parallels that used in cases applying conflict principles, we proceed on that ground.

In AFD I, in considering the distributors' claim of preemption we adopted the analytical structure previously employed by the Ohio federal courts construing the comparable Ohio statute. AFD I, 683 F.2d at 817. Relying on § 301 of the Copyright Act, the Ohio district court posed the crucial question as "whether the ... [motion picture] Act creates, grants, or destroys any rights that are 'equivalent' to the exclusive rights of copyright set forth in 17 U.S.C. § 106." *Allied Artists Pictures Corp.*, 496 F. Supp. at 443. That court concluded that the Ohio statute did not create rights equivalent to those in § 106, and did not deprive the distributors of copyright protections. Rather, the statute "provid[ed] procedures for licensing of a film, ... [and] recognize[d] *sub silentio* the right of the copyright owner to exhibit and to grant an exclusive or restrictive license to other to exhibit it." *Id.*

In the same opinion, the Ohio court also rejected the argument that the Ohio statute stood as a obstacle to the federally protected copyright (i.e., conflict preemption), because it viewed the challenged provisions -- a limit on guarantees, a prohibition on negotiations following unsuccessful bidding, a process for bidding with a concomitant ban on blind bidding, and a requirement for a trade screening -- as regulating market practices, rather than the copyright itself. For example, the court observed, the exclusive rights conveyed by a copyright did not authorize a copyright owner to engage in anti-competitive practices in violation of antitrust laws or in fraudulent or deceptive practices. *Id.* at 447 (citing, *inter alia*, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-57 (1948), and *Mariniello v. Shell Oil Co.*, 511 F.2d 853 (3d Cir. 1975)). Instead, the Ohio statute regulated distributors "in order to achieve fair and open bargaining," just as other state market regulations did. *Id.*

The distribution of motion pictures has been the subject of attention since at least the 1940s when the Department of Justice filed antitrust suits attacking certain practices prevailing within the industry. *See generally United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948)(requiring distributors to divest ownership of exhibition theaters). Again, in 1968 the effort of the Department of Justice to correct certain distributors' business practices resulted in stipulations in effect from 1969 to 1975 which restricted the number of blind-bidding films placed on the market by any single distributor. *See Allied Artists Pictures Corp.*, 496 F. Supp. at 417 & n.6; Patrick McNamara, "Copyright Preemption: Effecting the Analysis Prescribed by Section 301," 24 *Boston College L. Rev.* 963, 990 (1983)(citing *United States v. Paramount Pictures*, Civ. Action 87-273 (S.D.N.Y. Aug. 14, 1968)).[3]

The exhibitors and their trade association then lobbied state legislatures to adopt laws that prohibited blind bidding, and nearly half the states did so between 1978 through 1983. *See* Kathy

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[3] In the mid-1980's, the Department of Justice also proceeded against improper market practices by theater exhibitors themselves. *See generally* Stanley I Ornstein, "Motion Picture Distribution, Film Splitting, and Antitrust Policy," 17 *Hastings Comm. & Ent. L.J.* 415 (1995).

Herman, Comment, "Anti-Blind Bidding Legislation in the Motion Picture Industry: *Associated Film Distribution Corp. v. Thornburgh*, 5 J. L. & Com. 293, 299 (1984).

The Pennsylvania Act is one of the most comprehensive of the regulatory statutes enacted in that period. *See Associated Film Distrib.*, 520 F. Supp. at 979 (describing Pennsylvania's Act as "more comprehensive" than "Ohio's comparatively limited regulation"); *see also* Herman, *supra*, 5 J.L. & Com. at 304. Its provisions prohibiting blind bidding, prohibiting advances, and limiting minimum guarantees are comparable to regulation by other states of several aspects of the licensing and distribution practices for exhibition of films, and Miramax does not challenge those regulatory provisions before us.

The legislative findings and purposes included in the Pennsylvania Act set forth a litany of the unfair market practices it sought to prevent or ameliorate.[4] One of the most egregious practices was that of blind bidding; the marketing and licensing of a film prior to its completion and without offering exhibitors a chance to trade screen the final product. As a result, distributors could make deceptive claims regarding films offered for bidding. *See Associated Film Distrib.*, 614 F. Supp. at 1107 (discussing the distributors' practice of promoting films based on multiple screen stars who had only cameo roles or who were never seen together in a single scene); *see also Allied Artists Pictures*, 496 F. Supp. at 429-30 (describing information from distributors as "scant and sometimes misleading"). The Pennsylvania Act prohibits this practice. See 73 Pa. Cons. St. Ann. §§ 203-4, -8(b); *see also* Ohio Rev. Code Ann. § 1333.06(A).

Closely tied to the problem of blind bidding was the unfairness in the bidding process itself which occurred when distributors would unseal closed bids in collusion with a favored exhibitor (the use of "five o'clock looks") in order to enable the

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[4]These legislative concerns included, *inter alia*, undue control of exhibitors; restraint, destruction, or inhibition of fair and honest competition; unfair and deceptive acts or practices; and withholding full information regarding prospective motion picture purchases or rentals in a blind-bidding process. *See* 73 Pa. Cons. Stat. § 203-3.

exhibitor to offer a sufficiently high bid to obtain the film. *See Associated Film Distrib.*, 614 F. Supp. at 1112 ("Collusion between favorites often controlled the bidding for pictures."); *Allied Artists Pictures*, 496 F. Supp. at 430. There was even talk that some distributors simply disregarded all the bids and awarded a license to a favored exhibitor. *See id.*

To curtail these practices, the Pennsylvania Act requires that distributors issue invitations to bid that contain, in addition to the usual information, the names of all exhibitors invited to bid, and the day, time, and location for bid opening. *See* 73 Pa. Cons. St. Ann. § 203-8(a)-(c); *see also* Ohio Rev. Code Ann. § 1333.07(A)-(D). Both the Pennsylvania and the Ohio laws also require that exhibitors be able to examine all the bids. *See* 73 pa. Cons. St. § 203-8(d); Ohio Rev. Code Ann. § 1333.07(E).[5]

Another industry practice that Pennsylvania considered ripe for reform was the use of minimum guarantees and advances, *see Associated Film Distrib.*, 614 F. Supp. at 1109-10, which shifted the risks of unsuccessful exhibitions from distributors to exhibitors, who were required to pay fixed sums in advance of showing. *See Allied Artists Pictures*, 496 F. Supp. at 418. The provisions of the Pennsylvania Act directed to this practice prohibit minimum guarantee payments if there is also "a fee or other payment ... based in whole or in part on the attendance or box office receipts," 73 Pa. Cons. St. § 203-5; *see also* Ohio Rev. Code Ann. §1333.06(B), and prohibit advance payments in contracts for exhibition. *See* 73 Pa. Cons. St. § 203-6. *But see* Ohio Rev. Code Ann. § 1333.06(C) (allowing advances but prohibiting requirement of payment more than fourteen days before theater's first exhibition).

In AFD II, we recognized that statutes that bar exaction of advances from exhibitors, limit guarantees, and regulate the bidding and negotiation process may keep a distributor from achieving the optimal monetary return for the film. *See* AFD II, 800 F.2d at 376 (citing AFD I, 683 F.2d at 816 (quoting *Allied Artists Pictures*, 679

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[5] In *Associated Film Distributors*, the District Court observed that the Pennsylvania Act "permits oral bid solicitation and oral bids." 614 F. Supp. at 1112. Although the Act does not expressly permit an oral invitation to bid and bidding process, neither does it expressly prohibit either action.

F.2d at 662-63)). Nonetheless, we concluded that a reasonable government regulation that seeks to remedy problems caused by the economic disparity that impedes fairness in bargaining and honesty in business dealings is not impermissible merely because it has an economic effect on those regulated.

These regulations do not create a preemption issue because they only "touch copyrighted works indirectly." 1 Nimmer & Nimmer, *supra*, § 1.01[B][3][c] at 1-65. However, a state regulatory scheme that is "copyright-based in essence" presents a different matter. *See id.* The 42-day exclusive first-run license limitation in section 203-7 of the Pennsylvania Act is a distinctly different regulation from those within the state's power over improper market practices. If the state's ban on exclusivity after forty-two days directly regulates a right that is protected by federal copyright law, it must, of necessity, be preempted under conflict preemption principles.

Among the "exclusive rights" granted under § 106 in the Copyright Act are the rights to "distribute" and to "perform the copyrighted work publicly." However, section 203-7 requires the distributor to expand its distribution after forty-two days by licensing another exhibitor in the same geographic area, even if such expansion is involuntary. A distributor who exercises its federal right to grant an exclusive license to an exhibitor of choice will be subject to liability under the Pennsylvania Act for refusing to grant licenses to other exhibitors in the same geographic area after the forty-second day. It is evident that the Pennsylvania Act regulates the essence of the federally protected copyright.

That a copyright encompasses the right to refuse to license was reiterated by the Supreme Court in a decision post-dating AFD I and AFD II, which stated that the Copyright Act grants a copyright owner "the capacity arbitrarily to refuse to license one who seeks to exploit the work." *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990)(citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)); *see also Schnapper v. Foley*, 667 F.2d 102, 114 (1981)(vesting "the liberty not to license rights in his work"); *Lawlor v. National Screen Serv. Corp.*, 270 F.2d 146, 154 (3d Cir. 1959)(recognizing corollary right under copyright law to exclude others under licensing right).

In *Storer Cable*, 806 F. Supp. 1518, the court considered a

challenge to a local ordinance that raised a presumption that cable programmers who entered into exclusive licenses for the broadcast of their programming were engaging in proscribed conduct. Although the city defended the ordinance as a legitimate antitrust and pro-competition regulation, the court held it was preempted because "a presumption that exclusive licensing contracts are illegal is ... not amenable to any saving construction." *Id.* at 1540. The court noted that "[a] party who holds a copyright for cable programming and who does no more than grant another an exclusive distribution or exhibition license is then in automatic jeopardy of liability as a result of these sections, as is the licensee." *Id.* at 1539.

Orson argues that once a copyright holder, such as Miramax, makes an initial distribution, a state is free to regulate the manner in which the work is thereafter distributed. We reject Orson's contention. In *College Entrance Examination Board v. Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995), the court addressed a New York State law that required the owners of copyrights in certain standardized tests, which were used, *inter alia*, for graduate school admissions, to file copies of those tests with the State after they were administered. The court held that the new York law improperly interfered with the copyright holder's rights under § 106 because it required reproduction and distribution of the copyrighted tests in the face of the owners' desire not to do so.

Applying a similar analysis in this case, we note that Congress determined that the copyright holder should be granted exclusive rights under § 106, albeit for a limited period. Although a State regulation falling within the federally established exceptions to those rights, such as fair use, *see* 17 U.S.C. § 107, may obligate a copyright holder to change its practices to accommodate such uses, *see, e.g., Association of Am. Med. Colleges v. Carey*, 928 F.2d 519, 525-26 (2d Cir. 1991)(remanding to district court to make factual findings on whether existing State law constitutes fair use), the parties here have not suggested, nor can we conclude, that the regulation enacted through section 203-7 falls within one of the Copyright Act's exceptions.

Rather, the Pennsylvania Act, like the New York law regulating standardized tests, would impose on copyright holders,

contrary to their exclusive rights under § 106, an obligation to distribute and make available other copies of the work following their initial decision to publish and distribute copies of the copyrighted item. Although it is true, as Orson points out, that the examiners in *Association of American Medical Colleges* and in *College Entrance* engaged in extensive efforts to prevent disclosure of their tests, *see* Appellee Br. at 17 n.10, this factor does not change the fundamental principle that these cases offer: the State may not mandate distribution and reproduction of a copyrighted work in the face of the exclusive rights to distribution granted under § 106.

Even Orson's own quotation of *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981), *appeal dismissed and case remanded*, 782 F.2d 136 (10th Cir. 1985), another federal decision discussing an anti-blind bidding statute, supports our distinction between regulations that are designed to assure a fair market and honest business dealings and those that direct a copyright holder to distribute and license against its will or interests. That court stated:

> The right to transfer or license copyrighted material for use by others under sections 106 and 201 *et seq.* of the Copyright Act has never encompassed a right to transfer the work at all times and at all places free and clear of all regulations; it has meant that the copyright owner has the *exclusive right* to transfer the material for a consideration to others.

533 F. Supp. at 108 (emphasis added). Nothing in that quotation detracts from the copyright owner's exclusive federal right to decide to whom it will transfer the work. Moreover, the language from the same paragraph serves to support precisely the point made herein; as the *Warner Bros.* court stated, "No one has appropriated a product protected by the copyright law for commercial exploitation *against the copyright owner's wishes*." *id.* at 108 (emphasis added).

Unlike the provisions in the Pennsylvania Act that are directed to market practices that have no counterpart in the Copyright law, section 203-7 conflicts with the Copyright Act's grant to the copyright holder of an exclusive right to distribute and license a work, and it therefore follows that it is preempted.

V.
CONCLUSION

In conclusion, we hold that because § 203-7 of the Pennsylvania Feature Motion Picture Fair Business Practices Law "stands as an obstacle" to the federally created exclusive rights given to a copyright holder, namely, the exclusive right to distribute the copyrighted work, it is preempted by the federal Copyright Act. Our dictum in AFD I that section 203-7 "may have a greater impact upon [a distributor's] copyright rights," AFD I, 683 F.2d at 816, was prescient.[6]

For the reasons set forth above, we will reverse the decision of the District Court denying Miramax's Motion for Judgment as a Matter of Law and directing entry of judgment for Miramax.

ALITO, Circuit Judge, dissenting:

The court makes a strong argument that Section 203-7 of the Pennsylvania Feature Motion Picture Fair Business Practices Law, 78 Pa. Cons. Stat. § 203-7 (the "Pennsylvania Act"), is invalid on its face under principles of conflict preemption, but I believe that this argument is foreclosed by the panel decision in *Associated Film Distribution Corporation v. Thornburgh*, 683 F.2d 808, 816-17 (3d Cir. 1982)("AFD I"). In my view, Judge Sloviter, writing for the Court, interpreted AFD I correctly in *Associated Film Distribution v. Thornburgh*, 800 F.2d 369 (3d Cir. 1986)("AFD II"), when she wrote:

> [T]he earlier decision of this court ["AFD I"] conclusively established that the Pennsylvania Act was not facially preempted by the Copyright Act. At the same time, we recognized that in actual operation the Act might prevent or interfere with the goals of the Copyright Act and remanded for a factual determination by the district court of the Act's actual impact on federally created rights.

Id. at 375-76. Specifically addressing the 42-day provision, Judge Sloviter wrote:

> There may be merit to the distributors' argument that the 42-day provision, when construed as limiting the distributors' right to license an exclusive run to 42 days, is preempted by the Copyright Act. However, such preemption would be

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[6] In light of our conclusion, we need not address Miramax's objections to the trial proceedings.

> apparent on the face of the statute and cannot be reconciled with the court's earlier decision that the Act is not facially invalid under the Copyright Act. ... [W]e are bound to that position.

Id. at 377.

In a footnote, she added:

> The writer of this opinion believes that the 42-day clause is inconsistent with the Copyright Act. The Copyright Act gives the owner of a copyright the exclusive right to distribute copies of the copyrighted work by rental, lease, or lending. 17 U.S.C. § 106(3); *see also* M. Nimmer, Nimmer on Copyright § 8.11 at 8-115 (1985). That right encompasses the grant of an exclusive license for a period as long as the copyright owner desires within the term of the copyright. Nonetheless, she feels compelled to join her colleagues in affirming the district court decision because Internal Operating Procedure 8C of this court [now IOP 9.1] binds subsequent panels to reported panel opinions. Court in banc consideration is required to overrule a published opinion.

Id. at 377 n.3.

I also agree with the way AFD I was interpreted in the earlier appeal in this case. In *Orson, Inc. v. Miramax Film, Corp.*, 79 F.3d 1358, 1373 n.14 (3d Cir. 1996), the panel stated:

> [W]e have already rejected a facial challenge to Section 203-7 under the Copyright act, holding that "the Act on its face contains no threat to copyrights themselves ...." *Associated Films Distribution Corp. v. Thornburgh*, 683 F.2d 808, 816 (3d Cir. 1982), *cert. denied*, 480 U.S. 933, 107 S. Ct. 1573, 94 LED.2d 765 (1987); *see Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 269, 377 (3d Cir. 19856), *cert. denied*, 480 U.S. 933, 107 S. Ct. 1573, 94 LED.2d 765 (1987) ....
>
> While I entirely agree with the court that we are not constrained to follow dicta in prior opinions, I cannot reconcile the court's holding in this case with the holding of the prior panel in AFD I. The court's reinterpretation of AFD I is an innovative *tour de force*, but in the end I find it unconvincing. Accordingly, I

respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed August 20, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1994

ORSON, INC. t/a ROXY SCREENING ROOMS
v.
MIRAMAX FILM CORP.
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 93-cv-04145)
District Judge: Hon. J. Curtis Joyner

Argued: September 17, 1998
Before: SLOVITER, SCIRICA and ALITO, *Circuit Judges*
Submitted en banc July 19, 1999
Before: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, and STAPLETON, *Circuit Judges*
(Filed August 20, 1999)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The en banc court has granted the Petition for Rehearing filed by plaintiff Orson, Inc., d/b/a Roxy Screening Rooms, and vacated the decision of the panel which held that section 203-7 of the Pennsylvania Feature Motion Picture Fair Business Practices Law, 78 Pa. Cons. Stat. § 203-7, was invalid because it was preempted by the federal Copyright Act. *See Orson, Inc. v. Miramax Film Corp.*, 174 F.3d 377 (3rd Cir. 1999). Orson argues in its Petition for Rehearing that the panel's decision was foreclosed by previous decisions of this Court. This case directly presents the preemption issue, which the entire court now has the opportunity to examine and decide.

The positions of the parties are fully set forth in their original briefs. In addition, we have received amicus briefs from the Motion Picture Association of America ("MPAA") in support of appellant Miramax Film Corp. and from the National Association of Theatre Owners of Pennsylvania ("Theatre Owners") in support of affirmance. Because the issue is a straightforward one, the court en banc has decided to consider this case on the basis of the submitted briefs.

I.

BACKGROUND

Section 106 of the Copyright Act provides that, subject to certain exceptions inapplicable here, the owner of a copyright has:

> the exclusive rights to do and to authorize any of the following:
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; [and]
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.

17 U.S.C. § 106.

Another section of the same statute provides:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title. Thereafter, no person

> is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301.

Section 203-7 of the Pennsylvania Feature Motion Picture Fair Business Practices Law (the "Pennsylvania Act") provides that:

> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

73 Pa. Cons. Stat. § 203-7.

Plaintiff Orson, Inc., the owner of a Center City Philadelphia (referred to as "Center City") movie theater, brought suit in August 1993 against Miramax Film Corp., a motion picture production and distribution company, alleging that Miramax violated section 203-7 of the Pennsylvania Act by entering into an exclusive first-run exhibition agreement for more than forty-two days with another Center City theater. *See Orson, Inc. v. Miramax Film Corp.*, 983 F. Supp. 624, 626 (E.D. Pa. 1997).

Miramax distributes art films nationally, including in Philadelphia and the surrounding metropolitan area. The parties have not attempted to define "art films" other than as this court did in a prior opinion between the same parties by contrasting "art films" with "movies that may be characterized as 'commercial' or 'mainstream.'" *See Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1362 (3rd Cir. 1996) ("*Orson I*"). Only a limited number of theaters in any area exhibit art films.

Orson showed primarily second-run art films from January 1992 through October 1994 through the Roxy Screening Rooms, a Center City movie theater with two screens. The first runs of Miramax's art films were shown in Center City at the Ritz Theaters, a pair of theaters with five screens each, the Ritz Five an d the Ritz at the Bourse (collectively, "the Ritz"). During its two and one-half years of operation by Orson, the Roxy received only one first-run movie

from Miramax, and rarely received second-run movies after the forty-second day of play at the Ritz, despite repeated requests.

In its complaint, Orson charged that Miramax's distribution of films, specifically in its dealings with the Ritz, violated the Sherman Act, the Pennsylvania common law tort of unreasonable restraint of trade, and section 203-7 of the Pennsylvania Act. The District Court granted Miramax's motion for summary judgment.[1] *Orson, Inc. v. Miramax Film Corp.*, 862 F. Supp. 1378, 1390 (E.D. Pa. 1994). We affirmed the judgment for Miramax rejecting Orson's claims that the arrangement by which Miramax granted the Ritz an exclusive license to exhibit its first-run films constituted an illegal restraint of trade and antitrust violation. *Orson I*, 79 F.3d at 1358.

On the other hand, we vacated the judgment that the District Court had entered for Miramax on Orson's claim under section 203-7 of the Pennsylvania Act because we determined that the District Court had erred in its interpretation of section 203-7. *Id.* at 1374. The District Court had construed the statutory requirement that a distributor, such as Miramax, expand the run of the film after forty-two days to other theaters in the "geographical area" to have been satisfied by Miramax's expansion to suburban theaters before the forty-third day of their runs at the Ritz. *Orson, Inc.*, 862 F. Supp. at 1387. We held that the relevant geographical area for purposes of section 203-7 was the same area covered by the license, i.e., Center City. Because the record was disputed or incomplete, we remanded for further proceedings as to whether Miramax's actions as to those films violated section 203-7 of the Pennsylvania Act. *Orson I*, 79 F.3d at 1374-75.

On remand, the case proceeded to a jury trial, and the jury awarded Orson damages of $159,780. *See Orson, Inc.*, 983 F. Supp. at 626. In ruling on Miramax's post-trial motions, the District Court rejected Miramax's challenge to the constitutionality of section 203-7 because it read our decisions in *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3d Cir. 1982) *("AFD I")*, *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369 (3d Cir. 1986)

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[1] The court found that there was a factual dispute as to six of the nineteen films at issue. Orson withdrew its claim as to those six films to permit an immediate appeal.

("AFD II"), and *Orson I* as upholding the constitutionality of that section. *Orson, Inc.*, 983 F. Supp. at 630.

On appeal, the panel majority sought to distinguish the language in our earlier decisions and held that section 203-7 conflicts with the Copyright Act. The dissenting judge believed that we were bound by those opinions. Because we are now en banc, neither the language nor the holdings of those panel decisions bind us here. Therefore, we need not reach the issue of the effect of our prior decisions, and we are free to consider the preemption issue as a matter of law. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.
DISCUSSION
A.

Before we can consider the effect of the Copyright Act on the validity of section 203-7 of the Pennsylvania Act, we must address the meaning of that provision. The district courts have characterized the statutory language as vague and uncertain. *See, e.g., Orson, Inc.*, 862 F. Supp. at 1387 (characterizing statute's wording as "sufficiently vague" to permit alternate readings); *Associated Film Distrib. Corp. v. Thornburgh*, 614 F. Supp. 1100, 1111 (E.D. Pa. 1985) ("this part of the statute [section 203-7] was inartfully drafted, and distributors interpret its requirements differently"). As a result, the courts had differing views of a distributor's responsibility. *See Orson, Inc.*, 862 F. Supp. at 1387 (requirement for expansion after 42 days satisfied because several of the films under consideration "'expanded' to other Philadelphia area theaters, outside of Center City Philadelphia, before the 42-day period expired."); *Associated Film Distrib.*, 614 F. Supp. at 1123-24 ("The statute does not prevent distributors from contracting for runs longer than six weeks. . . . The statute also does not prevent a distributor from entering into a series of exclusive licenses with exhibitors as long as each license does not exceed 42 days."); *Associated Film Distrib.*, 520 F. Supp. at 994-95 ("After 42 days, the film must be reoffered for licensing, and the run must be 'expanded.'").

Finally, as we noted above, in *Orson I* we construed section 203-7 to "prohibit[] a distributor and exhibitor from entering into a license agreement which grants an exclusive first-run for more than

42 days without providing for expansion in the same geographical area covered by the license [here, Center City Philadelphia]." *Orson I*, 79 F.3d at 1374. One of the amici curiae, the Theatre Owners, takes issue with that construction. It argues that because we are en banc we can revisit the forty-two day rule in its entirety, and suggests that we construe it in a manner that does not lead to its unconstitutionality.

Amicus Theatre Owners recognizes that the Pennsylvania General Assembly "may very well have wanted to require that the first-run be expanded after 42 days," but it argues that "there is nothing in the statutory language which mandates that the first run must be expanded on the 43rd day." Theatre Owners Br. at 6. It states that all that the forty-two day rule requires is that provision must be made in the licensing agreement to expand the run if the term of the licensing agreement exceeds forty-two days and that "it is entirely consistent with federal copyright law for the distributor to enter into multiple licenses of 42 days each, or in good faith to consider multiple requests by exhibitors to license on the 43rd day but to reject on a reasonable business basis such requests to license." Theatre Owners Br. at 7.

This is of course the construction that this court rejected in its earlier opinions. *See AFD II*, 800 F.2d at 377. Although we agree with the Theatre Owners that we are free to revisit our statutory construction, we cannot accept its proffered interpretation of the language. We see no reason why the Pennsylvania legislature would have permitted consecutive forty-two day licenses to the same exhibitor. We believe the panel in *Orson I* correctly construed the language of section 203-7 to prohibit a motion picture distributor from entering into an exclusive first run arrangement for more than forty-two days. *See Orson I*, 79 F.3d at 1374. We thus cannot avoid deciding whether imposition of such a requirement on the copyright holder is preempted by the federal Copyright Act.

B.

The Supreme Court has recognized three ways in which federal law may preempt, and thereby displace, state law: (1) "express preemption," (2) "field preemption" (which is also sometimes referred to as "implied preemption"), or (3) "conflict preemption." *See Pacific Gas & Elec. Co. v. Energy Resources Conservation and*

Dev. Comm'n, 461 U.S. 190, 204 (1983); *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987). Express preemption arises when there is an explicit statutory command that state law be displaced. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992). An example of express preemption can be found in the subsection of the Employee Retirement Income Security Act of 1974, stating that the provisions of that Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

Under field- or implied-preemption principles, state law may be displaced "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted).

Finally, state law may be displaced under conflict-preemption principles if the state law in question presents a conflict with federal law in one of two situations: when it is impossible to comply with both the state and the federal law, *see Pacific Gas*, 461 U.S. at 204, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives in Congress," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

As the Court has noted, these categories are not necessarily airtight. *See English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) ("By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted filed conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.").

The Copyright Act contains an express preemption provision in § 301, which states, in relevant part:

> On and after January 1, 1978, *all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright* as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after the date and whether published or unpublished, *are governed exclusively by this title*. Thereafter, no person is

> entitled to any such right or equivalent right in any such work under the common law or statues of any State.

17 U.S.C. § 301(a) (emphasis added). The exclusive rights in the copyrighted work granted by the Act are reproduction; preparation of derivative works; distribution by sale, rental, lease or lending; public performance, in the case of motion pictures or audiovisual works; and public display of individual images from motion pictures or audiovisual works. 17 U.S.C. § 106.

State laws, whether statutory or common law, are subject to express preemption under Copyright Act § 301 only if they create rights that are "equivalent" to the exclusive rights within the general scope of copyright. *See* 17 U.S.C. § 301(a); *see also Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1986) (holding that because literary works, including compilations and derivative works, are within the subject matter of copyright, state common law that purported to protect a work for which plaintiff's copyright action was unsuccessful was preempted); 1 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 1.01[B][1] (1998) (discussing various state law causes of action).

As noted above, conflict preemption may arise either because "'compliance with both regulation is a physical impossibility' or because the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Jones*, 430 U.S. at 525; *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The purposes and objectives of Congress, which appear in the Copyright Act, are to implement a nationally uniform system for the creation and protection of rights in a copyrighted work. *See Goldstein v. California*, 412 U.S. 546, 561 (1973) (turning "to federal copyright law to determine what objectives Congress intended to fulfill").

An illustration of conflict preemption under the Copyright Act is provided by *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710-11 (1984). That case concerned an Oklahoma state law that banned advertising of alcoholic beverages by cable operators. However, the Copyright Revision Act of 1976 established a program of compulsory copyright licensing under the regulations of the Federal Communication Commission (FCC) pursuant to which a cable operator could transmit signals out of state upon payment of service

royalties. The Supreme Court held that the Oklahoma law was preempted, not only because the FCC had explicitly preempted the area, but also because the state law would destroy or interfere with the exercise of a federally created copyright right. *Id.* at 710-11; *see also* 1 Nimmer & Nimmer, *supra*, § 1.01[B][3]. *Cf. Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1534 (M.D. Ala. 1992) (city ordinance requiring cable programming provider to license programs to additional entities unconstitutional through either § 301 or conflict preemption).

A further illustration is provided by the recent opinion in *Rodrigue v. Rodrigue*, 1999 WL 76387 (E.D. La. Feb. 12, 1999). In that case, the divorced wife of an artist, who had registered some of his paintings, relied on Louisiana's community property law to seek one-half of his copyright ownership rights in the paintings authored by him during the marriage. The district court held the Louisiana community property law to be preempted on the question of ownership of copyright, reasoning that the operation of community property law in this setting would conflict in Congress's intention to vest copyright in the author alone at the time of the creation of the work. *See id.* at *5. *But see In re Marriage of Worth*, 195 Cal.App.3d 768, 241 Cal.Rptr. 135 (1987).

In this case, Miramax argues both express preemption and conflict preemption. Although both may be applicable, because our analysis more closely parallels that used in cases applying conflict principles, we proceed on that ground. Before we do so, it is necessary to understand the forces behind the passage of the Pennsylvania Act.

C.

The distribution of motion pictures has been the subject of attention since at least the 1940s when the Department of Justice filed antitrust suits attacking certain business practices prevailing within the industry. *See generally United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (requiring distributors to divest ownership of exhibition theaters). Again, in 1968 the effort of the Department of Justice to correct certain distributors' business practices resulted in stipulations in effect from 1969 to 1975 which restricted the number of blind-bidding films placed on the market by

any single distributor.[2] *See Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 417 & n.6 (S.D. Ohio (1980), *aff'd in relevant part and remanded in part*, 679 F.2d 556 (6th Cir. 1982); Patrick McNamara, "Copyright Preemption: Effecting the Analysis Prescribed by Section 301," 24 *Boston College L. Rev.* 963, 990 (1983) (citing *United States v. Paramount Pictures*, Civ. Action 87-273 (S.D.N.Y. Aug. 14, 1968)).

The exhibitors and their trade association then lobbied state legislatures to adopt laws that prohibited blind bidding, and nearly half the states did so between 1978 through 1983. *See* Kathy Herman, Comment, "Anti-Blind Bidding Legislation in the Motion Picture Industry: *Associated Film Distribution Corp. v. Thornburgh*," 5 *J. L. & Com.* 293, 299 (1984.

The Pennsylvania Act is one of the most comprehensive of the regulatory statutes enacted in that period. *See Associated Film Distrib.*, 520 F. Supp. at 979 (describing Pennsylvania's Act as "more comprehensive" than "Ohio's comparatively limited regulation"); *see also* Herman, *supra*, 5 J. L. & Com. at 304. Its provisions prohibiting blind bidding, prohibiting advances, and limiting minimum guarantees are comparable to regulation by other states of several aspects of the licensing and distribution practices for exhibition of films, and Miramax does not challenge those regulatory provisions before us.

The legislative findings and purposes included in the Pennsylvania Act set forth in litany of the unfair market practices the state sought to prevent or ameliorate.[3] One of the most egregious practices was that of blind bidding: the marketing and licensing of a film prior to its completion and without offering exhibitors a

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[2] In the mid-1980s, the Department of Justice also proceeded against improper market practices by theater exhibitors themselves. *See generally* Stanley I. Ornstein, "Motion Picture Distribution, Film Splitting, and Antitrust Policy," 17 *Hastings Comm. & Ent. L. J.* 415 (1995).

[3] In the mid-1980s, the Department of Justice also proceeded against improper market practices by theater exhibitors themselves. *See generally* Stanley I. Ornstein, "Motion Picture Distribution, Film Splitting, and Antitrust Policy," 17 *Hastings Comm. & Ent. L. J.* 415 (1995).

chance to trade screen the final product. As a result, distributors could make deceptive claims regarding films offered for bidding. *See Associated Film Distrib.*, 614 F. Supp. at 1107 (discussing the distributors' practice of promoting films based on multiple screen stars who had only cameo roles or who were never seen together in a single screen); *see also Allied Artists Pictures*, 496 F. Supp. at 429-30 (describing information from distributors as "scant and sometimes misleading"). The Pennsylvania Act prohibits this practice. *See* 73 Pa. Cons. Stat. §§ 203-4, -8(b).

Closely tied to the problem of blind bidding was the unfairness in the bidding process itself which occurred when distributors would unseal closed bids in collusion with a favored exhibitor (the use of "five o'clock looks") in order to enable the exhibitor to offer a sufficiently high bid to obtain the film. *See Associated Film Distrib.*, 614 F. Supp. at 1112 ("Collusion between favorites often controlled the bidding for pictures."); *Allied Artists Pictures*, 496 F. Supp. at 430. There was even talk that some distributors simply disregarded all the bids and awarded a license to a favored exhibitor. *See Allied Artists Pictures*, 496 F. Supp. at 430.

To curtail these practices, the Pennsylvania Act requires that distributors issue invitations to bid that contain, in addition to the usual information, the names of all exhibitors invited to bid, and the day, time, and location for bid opening. *See* 73 Pa. Cons. Stat. § 203-8(a)-(c). The Pennsylvania statute also requires that exhibitors be able to examine all the bids. *See* 73 Pa. Cons. Stat. § 203-8(d).[4]

Another industry practice that Pennsylvania considered ripe for reform was the use of minimum guarantees and advances, *see Associated Film Distrib.*, 614 F. Supp. at 1109-10, which shifted the risks of unsuccessful exhibitions from distributors to exhibitors, who were required to pay fixed sums in advance of showing, *see Allied Artists Pictures*, 496 F. Supp. at 418. The provisions of the Pennsylvania Act directed to this practice prohibit minimum guarantee payments if there is also "a fee or other payment . . . based

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[4] In *Associated Film Distributors*, the district court observed that the Pennsylvania Act "permits oral bid solicitation and oral bids." 614 F. Supp. at 1112. Although the Act does not expressly permit an oral invitation to bid and bidding process, neither does it expressly prohibit either action.

in whole or in part on the attendance or box office receipts," 73 Pa. Cons. Stat. § 203-5, and prohibit advance payments in contracts for exhibition, *see* 73 Pa. Cons. Stat. § 203-6.

In *AFD II*, we recognize that statutes that bar exaction of advances from exhibitors, limit guarantees, and regulate the bidding and negotiation process may keep a distributor from achieving the optimal monetary return for the film. *See AFD II*, 800 F.2d at 376 (citing *AFD I*, 683 F.2d at 816 (quoting *Allied Artists Pictures*, 679 F.2d at 662-63)). Nonetheless, we concluded that a reasonable government regulation that seeks to remedy problems caused by the economic disparity that impedes fairness in bargaining and honesty in business dealings is not impermissible merely because it has an economic effect on those regulated.

These market regulations, which we upheld in *AFD II* and *Orson I*, do not create a preemption issue because they only touch copyrighted works indirectly, if at all. However, a state regulatory scheme that is "copyright-based in essence" presents a different matter. *See* 1 Nimmer & Nimmer, *supra*, § 1.01[B][3][c] at 1-65. The forty-two day exclusive first-run license limitation in section 203-7 of the Pennsylvania Act is a distinctly different regulation from those within the state's power over improper market practices. If the state's ban on exclusivity after forty-two days directly regulates a right that is protected by federal copyright law, it must, of necessity, be preempted under conflict preemption principles.

Applications of these well-established legal principles to section 203-7, as construed in *Orson I* and as we construe it today, lead to the inescapable conclusion that the section cannot stand because it prohibits the copyright holder from exercising rights protected by the Copyright Act. Among the "exclusive rights" granted under § 106 in the Copyright Act are the rights to "distribute" and to "perform the copyright work publicly." However, section 203-7 requires the distributor to expand its distribution after forty-two days by licensing another exhibitor in the same geographic area, even if such expansion is involuntary and uneconomic. *See* MPAA Br. at 10 (uneconomic for first-run theater to exhibit art film simultaneously exhibited in same geographic market).

A distributor who exercises its federal right to grant an exclusive license to an exhibitor of choice will be subject to liability under the

Pennsylvania Act for refusing to grant licenses to other exhibitors in the same geographic area after the forty-second day. The potential for liability under the state law for the copyright holder's exercise of its federal rights became a reality in this case and illustrates the conflict created by the Pennsylvania Act. It is evident that the Pennsylvania Act regulates the essence of the federally protected copyright.

That a copyright encompasses the right to refuse the license was reiterated by the Supreme Court in a decision post-dating *AFD I* and *AFD II* which stated that the Copyright Act grants a copyright owner "the capacity arbitrarily to refuse to license one who seeks to exploit the work." *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)); *see also Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981) (vesting "the liberty not to license rights in his work"); *Lawlor v. National Screen Serv. Corp.*, 270 F.2d 146, 154 (3d Cir. 1959) (recognizing corollary right under copyright law to exclude others under licensing right).

In *Storer Cable*, 806 F. Supp. 1518, the court considered a challenge to a local ordinance that raised a presumption that cable programmers who entered into exclusive licenses for the broadcast of their programming were engaging in proscribed conduct. Although the city defended its ordinance as a legitimate antitrust and pro-competition regulation, the court held it was preempted because "a presumption that exclusive licensing contracts are illegal is . . . not amenable to any saving construction." *Id.* at 1540. The court noted that "[a] party who holds a copyright for cable programming and who does no more than grant another an exclusive distribution or exhibition license is then in automatic jeopardy of liability as a result of these sections, as is the licensee." *Id.* at 1539.

Orson argues that once a copyright holder, such as Miramax, makes an initial distribution, a state is free to regulate the manner in which the work is thereafter distributed. WE reject Orson's contention. In *College Entrance Examination Board v. Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995), the court addressed a New York state law that required the owners of copyrights in certain standardized tests, which were used, *inter alia*, for graduate school admissions, to file copies of those tests with the state after they were administered. The court held that the New York law improperly interfered with the

copyright holders' rights under § 106 because it required reproduction and distribution of the copyrighted tests in the face of the owners' desire not to do so.

A similar analysis is applicable in this case. Congress determined that the copyright holder should be granted exclusive rights under § 106, albeit for a limited period. Although a state regulation falling within the federally established exceptions to those rights, such as fair use, *see* 17 U.S.C. § 107, may obligate a copyright holder to change its practices to accommodate such uses, *see, e.g., Association of Am. Med. Colleges v. Carey*, 928 F.2d 519, 525-26 (2d Cir. 1991) (remanding to district court to make factual findings on whether existing state law constitutes fair use), the parties here have not suggested, nor can we conclude, that the regulation enacted through section 203-7 falls within one of the Copyright Act's exceptions.

Rather, the Pennsylvania Act, like the New York law regulating standardized tests, would impose on copyright holders, contrary to their exclusive rights under § 106, an obligation to distribute and make available other copies of the work following their initial decision to publish and distribute copies of the copyrighted item. Although it is true, as Orson points out, that the examiners in *Association of American Medical Colleges* and in *College Entrance* engaged in extensive efforts to prevent disclosure of their tests, *see* Appellee Br. at 17 n.10, this factor does not change the fundamental principle underlying these cases: the state may not mandate distribution and reproduction of a copyrighted work in the face of the exclusive rights to distribution granted under § 106.

Even Orson's own quotation of *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981), *appeal dismissed and case remanded*, 782 F.2d 136 (10th Cir. 1985), another decision discussing an anti-blind bidding statute, supports our distinction between regulations that are designed to assure a fair market and honest business dealings and those that direct a copyright holder to distribute and license against its will or interests. That court stated,

> The right to transfer or license copyrighted material for use by others under sections 106 and 201 *et seq.* of the Copyright Act has never encompassed a right to transfer the work at all times and at all places free and clear of all regulation; it has

> meant that the copyright owner has the *exclusive right* to transfer the material for a consideration to others.

533 F. Supp. at 108 (emphasis added). Nothing in that quotation detracts from the copyright owner's exlcusive federal right to decide to whom it will transfer the work. Moreover, the language from the same paragraph serves to support precisely the point made herein; as the *Warner Bros.* court stated, "No one has appropriated a product protected by the copyright law for commercial exploitation *against the copyright owner's wishes.*" *Id.* at 108 (emphasis added).

Unlike the provisions in the Pennsylvania Act that are directed to market practices that have no counterpart in the Copyright law, section 203-7 conflicts with the Copyright Act's grant to the copyright holder of an exclusive right to distribute and license a work, and it therefore follows that it is preempted.

III.

In conclusion, we hold that because section 203-7 of the Pennsylvania Feature Motion Picture Fair Business Practices Law "stands as an obstacle" to the federally created exclusive rights given to a copyright holder, namely, the exclusive right to distribute the copyrighted work, it is preempted by the federal Copyright Act.[5]

For the reasons set forth above, we will reverse the decision of the District Court denying Miramax's Motion for Judgment as a Matter of Law and we will direct it to enter judgment for Miramax.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[5] In light of our conclusion, we need not address Miramax's objections to the trial proceedings.

TEXT OF THE STATUTORY PROVISIONS INVOLVED
73 Pa. Cons. Stat. §§ 203-1--203-11 (1993)

Section 203-1. Short title

This act shall be known and may be cited as the "Feature Motion Picture Fair Business Practices Law."

Section 203-2. Legislative findings and purposes

The General Assembly of the Commonwealth of Pennsylvania finds and declares that the licensing and distribution of feature motion pictures to theaters in this Commonwealth, including the rights and obligations of distributors and exhibitors, vitally affects the general economy as well as the access of the public to works of artistic expression and opinion. In order to promote the public interest and public welfare of this Commonwealth to:

(1) insure unabridged access for the public to artistic expression and opinion in feature motion pictures at reasonable prices and at many different locations;

(2) avoid undue control of the exhibitors by the distributors;

(3) foster vigorous and healthy competition in offering feature motion pictures for the benefit of the public by prohibiting practices through which fair and honest competition is restrained, destroyed, or inhibited;

(4) promote the wide geographical dissemination at reasonable prices to the public of ideas, opinions, and artistic expression in feature motion pictures;

(5) prevent delay in the exhibition of feature motion pictures to the public in theaters playing subsequent to the first run showing;

(6) prevent theaters from unnecessarily going out of business, thereby resulting in reducing the number of small independent businesses and unemployment with loss of tax revenues and other desirable consequences;

(7) prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of distribution and exhibition of feature motion pictures within the Commonwealth;

(8) promote fair and effective competition in that business;

(9) benefit the movie going public by limiting the long and extensive first runs so that additional theaters, in a given area, may also exhibit the same feature motion picture and at possibly a lower

admission price; and

(10) prohibit blind bidding by insuring that exhibitors have the opportunity to view a motion picture and know its contents before committing themselves to exhibit in their communities;

it is necessary to legislate regulation and standards pursuant to the exercise of the police power of this Commonwealth governing the relationship between feature motion picture distributors or licensors and exhibitors serving the public by establishing fair business practice procedures for the licensing and distribution of feature motion pictures within the Commonwealth and to provide remedies for the violation of this act, including damages and attorneys' fees.

Section 203-3. Definitions

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Bid." A written or oral proposal by an exhibitor to a distributor, which proposal is in response to an invitation to bid or negotiate and states the terms under which the exhibitor will agree to exhibit a feature motion picture.

"Blind Bidding." Bidding, negotiating, offering terms, accepting a bid or agreeing to terms for the purpose of entering into a license agreement prior to a trade screening of the feature motion picture that is subject to the agreement.

"Distributor." Any person engaged in the business of renting, selling or licensing feature motion pictures to exhibitors.

"Exhibit or exhibition." Showing feature motion pictures to the public for a charge.

"Exhibitor." Any person engaged in the business of operating one or more theaters in this Commonwealth.

"Invitation to bid." A written or oral solicitation or invitation by a distributor to one or more exhibitors to bid or negotiate for the right to exhibit a feature motion picture.

"License agreement." any contract, agreement, understanding, or condition between a distributor and an exhibitor for the exhibition of a feature motion picture by the exhibitor.

"Person." One or more individuals, partnership, associations, societies, trusts or corporations.

"Run." The continuous exhibition of a feature motion picture in a defined geographical area for a specified period of time. A "first run" is the first exhibition of a feature motion picture in the designated area; a "second run" is the second exhibition and "subsequent runs" are subsequent exhibitions after the second run. "Exclusive run" is any run limited to a single theater in a defined geographical area and a "nonexclusive" or "multiple run" is any run in more than one theater in a defined geographical area.

"Theater." Any establishment in which feature motion pictures are exhibited regularly to the public for a charge.

"Trade Screening." The showing of a feature motion picture by a distributor in recognized exchange cities within the Commonwealth which is open to any exhibitor.

Section 203-4. Blind Bidding

Blind Bidding is hereby prohibited within the Commonwealth. No negotiations between exhibitors and distributors for the licensing or exhibition of any feature motion picture within the Commonwealth before the feature motion picture has been trade screened within the Commonwealth.

Section 203-5. Guarantees

(a) **Minimum payment to distributor.**-It shall be unlawful for any license agreement which provides for a fee or other payment to the distributor based in whole or in part on the attendance or the box office receipts at a theater within the Commonwealth to contain or to be conditioned upon a guarantee of a minimum payment to the distributor.

(b) **Prohibited guarantees void.**-Any provision, agreement or understanding which provides for such guarantee shall be void and purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

Section 203-6. Advances

(a) **Advances prohibited.**-It shall be unlawful for any license agreement for the exhibition of a feature motion picture at a theater within the Commonwealth to contain or be conditioned upon a provision, agreement or understanding that the exhibitor shall advance any funds prior to the exhibition of the picture as security for the performance of the license agreement or to be applied to payments under such an agreement.

(b) **Prohibited advances void.**-*Any provision*, agreement or understanding which provides for such an advance shall be void and any purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

Section 203-7. Length of run

No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theaters within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theaters that would normally be served on subsequent run availability.

Section 203-8. Bidding procedures

(a) Invitation to bid contents.-If bids are solicited from exhibitors for the licensing of a feature motion picture within the Commonwealth, then the invitation to bid shall specify the following:

(1) Whether the run for which the bid is being solicited is a first, second or subsequent run; whether the run for which the bid is being solicited is a first, second or subsequent run; whether the run is an exclusive or nonexclusive run; and the geographical area for the run.

(2) The names of all exhibitors who are being solicited.

(3) The date and hour the invitation to bid expires.

(4) The time, date, name and address of the location where the bids will be opened, which location shall be in the exchange centers of this Commonwealth.

(b) Trade screening.-If the motion picture that us the subject of a bid has not already been trade screened within the exchange centers in this Commonwealth, the distributor soliciting the bid shall include in the invitation to bid, the date, time and location of the trade screening for such picture.

(c) Bid submission and opening.-All bids shall be submitted in writing and shall be opened at the same time and in the presence of those exhibitors, or their agents, who submitted bids and are present at such time.

(d) Examination of bids.-Any exhibitor, or agent of

exhibitor, who submits a bid for a particular run of a feature motion picture may, at reasonable times within 60 days after a bid is opened, examine any bid that is made for the same run of the motion picture by another exhibitor. The exhibitor may examine the bids even if the distributor rejects all bids that are submitted. Within seven business days after a bid for a particular run of a feature motion picture is accepted, the distributor shall notify in writing each exhibitor who submitted a bid for that run, the terms of the accepted bid and the identity of the successful bidder.

(e) Rejection of all bids.-If a distributor issues invitations to bid for a feature motion picture and rejects all bids received, he shall not enter into a license agreement for the exhibition of the picture except by the means of the bidding process specified in this section. If the distributor rejects all bids submitted pursuant to the invitation to bid, he shall notify all exhibitors who submitted bids that he rejected all bids and shall issue a new invitation to bid.

Section 203-9. Application of act to prior agreements

This act shall not apply to any license agreement entered into prior to the effective date of this act, except that a renewal of such license agreement shall not be excluded from the application of this act.

Section 203-10. Actions against distributors and exhibitors

Any exhibitor may bring an action against a distributor or exhibitor or both in the respective court of common pleas wherein the exhibitor's place of business is located to recover damages sustained by reason of a willful and intentional violation of his act and, where appropriate, shall also be awarded the costs of the action including, but not limited to, reasonable attorneys' fees.

Section 203-11. Liability of exhibitor for furnishing information

No liability on the part of and no cause of action of any nature shall arise against any exhibitor, its officers, agents or employees furnishing information as to violations of this act, or for statements made for evidence submitted at any hearing or trial conducted in connection therewith.

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

17 U.S.C. § 106

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, including the individual images of a motion pictures or other audiovisual works, to display the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 301

§ 301. Preemption with respect to other laws

(a) On or after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to –

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on or after February 15, 2067.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States

thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual arts to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to –

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) if the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

Supreme Court, U.S.
FILED
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(2)

No. 99-866

IN THE

Supreme Court of the United States

ORSON, INC.,

Petitioner,

v.

MIRAMAX FILM CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Miramax Film Corp., is an indirect wholly owned subsidiary of The Walt Disney Company which is publicly traded.

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COUNTERSTATEMENT OF THE CASE

Petitioner Orson, Inc. ("Orson") seeks review by this Court of a unanimous decision of the Court of Appeals for the Third Circuit, sitting *en banc*, that applied well-established principles of copyright law and preemption analysis to Pennsylvania's "42-day provision," 73 Pa. Cons. Stat. Ann. § 203-7. The Court of Appeals held, without dissent, that the 42-day provision, which limits the duration of exclusive first run licenses under copyright to forty-two days was preempted by the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, 106, and by the Supremacy Clause of the United States Constitution (92a-107a). Orson also seeks review of the Court of Appeals' earlier affirmance of summary judgment against it on its antitrust claim.

Contrary to Orson's petition, which substitutes rhetoric for reason and atmospheric adjectives such as "clandestine conspiracy" (Petition at 3) for facts, the Court of Appeals' unanimous decision is entirely consistent with both this Court's jurisprudence and the jurisprudence of the Sixth and Ninth Circuits. In short, no conflict among the circuits, no departure from precedent, nor any other legal principle, warrants this Court's review of the Court of Appeals' *en banc* ruling on the preemption issue or its dismissal of Orson's antitrust claims.

Because Orson's statement of the case is both incomplete and incorrect, Miramax Film Corp. ("Miramax") Miramax submits the following brief summary of the relevant facts.

A. The Business of Miramax.

Miramax is a distributor of feature motion pictures. Miramax is particularly known for the critically acclaimed specialty films it distributes, many of which have received numerous Academy Awards and Golden Globe Awards.[1] All of

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1. The films at issue in this case include such critically recognized motion pictures as "The Crying Game," "Delicatessen," "Double Life of Veronique," "Enchanted April," "Ethan Frome," "Farewell My Concubine," "High Heels," "Map of the Human Heart," "Mediterraneo," "Passion Fish," "The Piano," "Reservoir Dogs," "Snapper," "Strictly Ballroom" and "Zentropa."

the films released by Miramax during the time period at issue in this case were registered with the Copyright Office and are protected by the Copyright Act. Miramax's high-quality, lower budget films often appeal to a more limited audience than do big-budget, "blockbuster" films. In contrast to more commercial films, which are generally distributed in wide release (that is, on a large number of screens nationwide on a given date), specialty films like those distributed by Miramax are often released initially to a limited number of carefully chosen theatres, and are expanded to other venues only after the film has garnered favorable word-of-mouth or critical review. Thus, the choice of a theatre is of particular importance for such films.

Miramax distributes its films worldwide and, like other distributors, licenses many of its film for exhibition in central Philadelphia. No evidence was presented in this case to suggest any scarcity of available film fare (including both commercial and specialty films) in central Philadelphia during the relevant period.

Like other film distributors, Miramax licenses its films to theatres for exhibition for a designated amount of time. Frequently, the license is exclusive to a prescribed area for the duration of the license (23a). Those exclusivities are referred to as "clearances." The use of exclusive licenses in given areas for specialty films is often a practical necessity, because those films generally attract a smaller audience that is insufficient to sustain multiple theatres showing the same film in the same area, and because of the cost associated with generating multiple prints of a film (23a).

The period of time during which a particular exhibitor is licensed to show a film is called a "run." A "first run" is the first exhibition of a film in a given geographic area. "Subsequent runs," by definition, follow the first run. The length of the first run and any subsequent runs depend in large part on the distributor's and exhibitor's estimation of the film's likely success.

The first run is particularly critical for low-budget specialty films. Unlike big budget commercial films, which are widely released and backed by extensive promotional efforts and expenditures, the success of specialty films depends primarily on word-of-mouth response and favorable critical reviews for their longer term success. To attract audiences, it is important that such films be exhibited on their first run at the most desirable and most popular venues.

Films are generally licensed under a formula which divides those revenues between the exhibitor and the distributor that exceed a "house allowance" (a dollar amount which approximates the exhibitor's weekly expenses) (23a). The exhibitor then retains a percentage of the weekly gross from ticket sales above the house allowance, and the remaining percentage is paid to the distributor. The revenues of both the distributor and exhibitor ultimately depend both on the public's response to a particular film, and on the ability of a particular theatre to attract the movie-going public. The distributor's choice of a theatre is premised upon many factors that create its perception of a particular theatre's ability to attract audiences.

B. Film Licensing in Central Philadelphia.

Orson owned and operated the Roxy Screening Rooms (the "Roxy"), a movie theatre located in central Philadelphia, after January, 1992. The Roxy exhibited specialty films on two screens, each with a 140 person seating capacity.

During the same time period, the Ritz Theatres (the "Ritz") also exhibited specialty films in central Philadelphia. The Ritz consisted of two separate five-screen facilities: the Ritz Five Theatres and the Ritz at the Bourse.[2] As the court below recognized, the Ritz was superior to the Roxy in many respects (36a) (finding that Ritz generated higher grosses, with better facilities and equipment, provided better marketing for its films, and had a better payment records, and that Miramax's choice to

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2. Other theatres operated in downtown Philadelphia during the relevant time period, in competition with the Ritz and the Roxy, and most continue to operate.

license exclusively to the Ritz was reasonable). By contrast, the Roxy was far less profitable, and had been in and out of business over the years.

Although Orson contends in its statement of the case that the Roxy offered better "financial terms" for certain films (Petition at 2) Orson ignores the many other factors that Miramax had discretion to consider and did consider when making its licensing decisions.[3] Miramax perceived the Roxy as inferior to the Ritz and the other theatres in the Center City area and, hence, as undesirable for first runs. Not surprisingly, it chose to license its films to the Ritz over the Roxy for the important first runs.

Between January, 1992 and February, 1994, Miramax licensed approximately 28 films to the Ritz on a first-run basis, and one film on a subsequent run basis. During the same time period, Miramax licensed to the Roxy one film for a first-run, and fourteen films for subsequent runs. Although the Roxy sought licenses from Miramax for some of the first run films Miramax licensed to the Ritz, its requests were refused by Miramax because of Miramax's desire to exhibit its films at the more popular and attractive Ritz and other venues.

All of the first-run licenses Miramax granted to the Ritz were exclusive for central Philadelphia. The evidence was uncontroverted that, because of the more limited market for specialty films, the Ritz would not have exhibited most of the Miramax films at issue in this case if they had also been licensed during the first run to another competing theatre within Central Philadelphia.

C. The Present Action.

Orson commenced this lawsuit against Miramax in August, 1993, alleging antitrust claims under state common law and Section 1 of the Sherman Act, 15 U.S.C. § 1, as well as various

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3. To the extent that Orson claims that it offered to Miramax a higher percentage of box office receipts than did the Ritz, it overlooks the fact that the box office receipts at the Roxy would not equal those from the Ritz.

claims under the Pennsylvania Motion Picture Fair Business Practices Act (the "Pennsylvania Act"), 73 Pa. Cons. Stat. Ann. § 203-1. Orson contended that Miramax's decision to grant exclusive licenses to the Ritz for several of its films and its refusal to license those films for exhibition at the Roxy violated both the antitrust laws and the Pennsylvania Act.[4]

With respect to its antitrust claims, Orson asserts that the "clearances" were the result of a "clandestine conspiracy" to refuse to deal with the Roxy, with the "clearances providing the vehicle by which the conspiracy was effected" (Petition at 3). Significantly, the District Court granted summary judgment as to *all* of Orson's claims in October, 1994 except claims as to six Miramax films under the Pennsylvania Act's 42-day provision, Section 203-7 (11a). On the antitrust claims, the District Court found as a matter of law that Miramax's decisions to license first runs on an exclusive basis to the Ritz were both reasonable and pro-competitive. *Id.* The Court of Appeals affirmed that holding (37a).

As to the Pennsylvania Act's 42-day provision,[5] the Court of Appeals reversed summary judgment and remanded those claims to the District Court for trial (43a). In so doing, the Third Circuit rejected the interpretation of Section 203-7 previously applied by the District Court and held, instead, that Section 203-7 required distributors to terminate their exclusive first run licenses after 42 days and to "expand" the run to other theatres

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4. Orson also alleged violations of certain other provisions of the Pennsylvania Act. Those claims were dismissed at trial, and Orson does not challenge that dismissal.

5. The 42-day provision section 203-7 of the Pennsylvania Act, 73 Pa. Stat. Ann. § 203-7 (entitled "Length of Run") provides as follows:

> [n]o license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run [of a copyrighted motion picture] . . . for more than 42 days *without provision to expand the run to second run or subsequent run theaters within the geographical area* (emphasis added).

in the same geographic area as the exclusive first run licenses (44a).[6]

After remand, the claims against Miramax under the 42-day provision were tried to a jury, which returned a verdict in favor of Orson. Based on its finding that the 42-day provision required Miramax to grant to Orson exclusive licenses for seventeen films, the jury awarded Orson minimal damages consisting of ten percent of the profits Orson claimed it would have earned had it exhibited those films.[7] The assumption implicit in this verdict was that the 42-day provision required Miramax to terminate its exclusive first run licenses to the Ritz after 42 days and, thereafter, to grant exclusive licenses for those films to the Roxy, regardless of Miramax's wishes (50a-59a).

Miramax appealed the judgment to the Court of Appeals for the Third Circuit, contending, among other things, that the 42-day provision, both on its face and as applied by the Court of Appeals in this case, was preempted by the United States Copyright Act, 17 U.S.C. §§ 101, *et seq.* and the Supremacy Clause, that there was no evidence that Miramax had "willfully and intentionally" violated the Pennsylvania Act, 73 Pa. Const. Stat. Ann § 203-10, and that there was no evidence that Miramax would have licensed its films to the Roxy, as opposed to one of the other theatres in central Philadelphia, had it been forced to terminate exhibition at the Ritz after 42 days. A different panel of the Court of Appeals agreed with Miramax that the 42-day rule was preempted by the United States Copyright Act, 17 U.S.C. §§ 101, *et seq.* and the Supremacy Clause (80a-89a, 101a). After granting Orson's Petition for Rehearing because of the need to reconcile the panel's preemption ruling with prior decisions of other panels (72a-80a), the Court of Appeals, sitting

6. The District Court initially interpreted Section 203-7 to be satisfied by expansion of the run in other geographic areas than the first run clearance, thereby preserving the exclusivity of the first run license in its geographic area (12a).

7. Following the jury's verdict, Miramax moved for Judgment as a Matter of Law, or in the Alternative for a New Trial. That motion was denied.

en banc, issued its unanimous decision agreeing with the initial panel's decision and reversing the District Court's judgment.

REASONS FOR DENYING THE WRIT

Pursuant to Congress' express constitutional authority to "promote the progress of the Useful Arts, by securing to Authors . . . the exclusive right to their respective writings" (U.S. Const., Art. I, Sec. 8, cl. 8), the United States Copyright Act, 17 U.S.C. §§ 101, *et seq.*, gives to copyright holders the exclusive right to exhibit, or license others to exhibit (or not to license at all) their copyrighted works for up to the full term of the copyright. 17 U.S.C. § 106. The 42-day provision which is unique to Pennsylvania, imposes liability for the mere exercise of these federally protected rights, and vests those rights in persons other than the copyright holder. Based upon well-settled principles of copyright and conflict preemption, a unanimous Court of Appeals, sitting *en banc*, properly held that that state law was preempted; its decision in no way warrants the extraordinary remedy of Supreme Court review.

The unanimous decision of the Court of Appeals was completely consistent with, and indeed, compelled by, prior decisions of this Court and other Courts that have considered comparable restrictions. No prior opinion of this Court or any other Circuit Court of Appeals has ever upheld a restriction comparable to the statute at issue in this case; to have done so would be contrary to all applicable precedent. Orson's attempt to compare the statute at issue to antitrust laws directed at concerted market activity fails because the 42-day provision does not restrain a copyright owner from violating other state or federal laws; instead, it prevents the copyright owner from exercising the very rights granted to it under copyright law.

As to Orson's challenge to the Court of Appeals' decision upholding summary judgment against its antitrust claims, the Court of Appeals followed a long and unbroken line of authority upholding vertical non-price restraints such as the clearances at issue in this case under the "rule of reason." Orson presents no grounds for disturbing that decision.

ARGUMENT

I. There is No Reason to Grant Certiorari on Orson's Antitrust Claims.

A. The Third Circuit faithfully followed the decisions of this Court and an "avalanche of authority" in permitting Miramax to grant exclusive licenses to the Ritz.

In concluding that Miramax did not violate the antitrust laws by licensing its films to Orson's competitors for exclusive first runs, the Court of Appeals applied the teaching of an unbroken line of precedent extending back over 50 years. Beyond the film industry, it is well-established that exclusive distribution arrangements, whether "clandestine" or otherwise, are legal — virtually *per se* legal. In *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957), the court held that exclusive distributorships are lawful unless part of a scheme to monopolize an entire market. "The fact that . . . other dealers in the same product . . . are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement." *Id.* at 421. In *Packard*, the court concluded that the right of one supplier of automobiles to limit distribution of its brand to one or a few dealers was so clear that the supplier could lawfully terminate existing dealers in Baltimore, Maryland and concentrate distribution in a single dealer. *Id.*

In *GTE Sylvania Inc., v. Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976) (en banc), *aff'd*, 433 U.S. 36 (1977), the court recognized that "[t]here is a veritable avalanche of precedent to the effect that, absent evidence of monopolization, a manufacturer may legally grant . . . an exclusive franchise." *See TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802 (6th Cir. 1988); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs., Inc.*, 637 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Elder-Beerman Stores Corp. v. Federated*

Dep't Stores, 459 F.2d 138, 146 (6th Cir. 1972); *Futurevision Cable Systems of Wiggens, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760 (S.D. Miss. 1992), *aff'd*, 986 F.2d 1418 (5th Cir. 1993); *Northeastern Educational Television of Ohio, Inc. v. Educational Television Assn.*, 758 F. Supp. 1568 (N.D. Ohio 1990); *Philadelphia Fast Foods, Inc. v. Popeyes Famous Fried Chicken, Inc.*, 647 F. Supp. 216, 224 (E.D. Pa. 1986). The Court has recognized that "interbrand competition is the primary concern of the antitrust laws," *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988), and that "so long as interbrand competition existed, that would provide a 'significant check' on any attempt to exploit intrabrand market power." *Id.* at 725.

For this reason, courts have uniformly held that where a defendant faces significant competition in the relevant market, *i.e.*, where interbrand competition exists, competition will not be unreasonably restrained by the defendant's refusal to supply its product to the plaintiff. As a matter of law, the availability of competitive products precludes a finding of injury to competition. *See, e.g., R.W. International Corp. v. Welch Food, Inc.*, 13 F.3d 478, 487 (1st Cir. 1994) (affirming summary judgment for defendant because competitive products of defendant were available in the marketplace: "to survive summary judgment, plaintiffs needed to demonstrate a genuine dispute as to whether defendants actions injured competition, as distinguished from impact on themselves."); *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1173 (9th Cir. 1988) (affirming summary judgment: plaintiff "has not presented any evidence that [defendant] controlled the surplus milk supply in California."); *Elder-Beerman Stores Corp. v. Federated Department Stores*, 459 F.2d 138, 148 (6th Cir. 1972) (reversing judgment for plaintiff: "The plaintiff's theory virtually ignored the necessity for proof that comparable alternative brands were not available."); *Ace Beer Distributors, Inc. v. Kohn*, 318 F.2d 283, 287 (6th Cir. 1963). ("There is no allegation or contention that the beer of other breweries was not just as

available in that area after the change in distributors as it was before."), *cert. denied*, 375 U.S. 982 (1964).

As the Court of Appeals found, *Theee Movies of Tarzana v. Pacific Theaters, Inc.*, 828 F.2d 1395, 1399 (9th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988), applies this fundamental principle to the film distribution industry. In that case, the plaintiff claimed that clearance agreements gave certain theatres an unreasonable competitive advantage. The Ninth Circuit Court of Appeals rejected this assertion, holding that the defendant film distributors had a legitimate business interest in the revenue generated by the theatres, because the distributors were paid, in part, out of the films' gross profits. *Id.* at 1399 (*citing United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 145-46 (1948)). Clearances are "reasonable restraints of trade"

> when the theaters are in substantial competition, and the clearances are used to assure the exhibitors that the distributor will not license a competitor to show the movie at the same time or so soon thereafter that the exhibitor's expected income will be greatly diminished.

The "whole system of runs and clearances . . . purposely, *and legitimately*, discriminates between competing theaters." *Id.* (quoting *Naumkeag Theatres Co., Inc. v. New England Theaters, Inc.*, 345 F.2d 910, 912 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965)) (emphasis added). To paraphrase the Court of Appeals, although Miramax's "clearances reduced intrabrand competition by preventing [Orson] from showing first run movies simultaneously with the [Ritz] . . . they also encouraged interbrand competition by forcing [Orson] to find alternative subrun movies to exhibit and to promote." *Id.* at 1399.

Here, it is undisputed that the Ritz and Orson were in substantial competition and that both were located in central Philadelphia. In fact, the existence of competition between the Ritz and Orson is essential to Orson's claim. The dispute between Orson and Miramax involves exactly the type of clearance agreement at issue in *Theee Movies of Tarzana*, and

is entirely permissible under the antitrust laws. Contrary to Orson's assertion, the Court of Appeals did not hold all clearances in all circumstances to be lawful per se; rather, the Court found reasonable a clearance arrangement whereby the Ritz was given first runs that excluded Orson's theatre, which was in substantial competition with the Ritz. This wholly unremarkable application of settled antitrust principles to undisputed facts is not worthy of review by this Court.

As in *Theee Movies of Tarzana* and an "avalanche" of other exclusive distributorship cases, a decision by Miramax to license the Ritz exclusively did not in any way foreclose Miramax's rivals from distributing their films, nor did it foreclose Orson from licensing the films of those rivals. Thus, the result of the purported agreement by Miramax to limit distribution of its films to the Ritz created more interbrand competition, not less, and there was no violation of the antitrust laws.

B. The Third Circuit's decision is consistent with, and supported by, the Ninth Circuit's opinion in *Harkins*.

Orson nevertheless contends that this Court should grant its petition to resolve a purported conflict between the Court of Appeals' decision and the decision of the Ninth Circuit Court of Appeals in *Harkins Amusement Enterprises, Inc. v. General Cinema Corporation*, 850 F.2d 477 (9th Cir. 1988) ("*Harkins Amusement*"). Orson can advance this argument only by distorting the holding in *Harkins Amusement* and making the startling assertion that "the Ninth Circuit held that nonprice, vertical restraints of trade strikingly similar to those at issue here were *per se* illegal, and were not subject to the rule of reason at all" (Petition at 18). The Ninth Circuit held no such thing, and the Court of Appeals in this case "ignored" *Harkins Amusement* only because it is a horizontal conspiracy case having no application here.

Orson's antitrust claim is premised on the contention that Miramax's decision to license its films for first runs exclusively to Orson's principal competitor in central Philadelphia — the Ritz — constituted a non-price, vertical restraint that is *per se*

illegal. Orson does not contend — and there is no evidence — that Miramax conspired with other distributors to deprive Orson of first run films or that the Ritz conspired with other exhibitors for the same purpose. Nor does Orson allege that Miramax has monopoly power over films distributed for theatrical exhibition. As it did before the Court of Appeals, Orson uses language in its petition suggesting that there is something unique about Miramax films which requires that it be treated as a quasi-monopolist, The Court of Appeals rejected this suggestion:

> We also note that Orson did not allege nor did it present evidence to show that Miramax was a monopolist or that *only Miramax* constituted the relevant product market. . . . We make these points because Orson's antitrust theory frequently seemed premised on an analysis of a market which was limited to Miramax's product.

(40a, n.12). As the Court of Appeals properly held, the relationship between Miramax and the Ritz constitutes a routine vertical restraint, and "[t]he Supreme Court has instructed that vertical restraints of trade which do not present an express or implied agreement to set resale prices, are evaluated under the rule of reason. *Business Elec. Corp. [v. Sharp Elec. Corp.]*, 485 U.S. [717] at 724 [(1988)]; *See also Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)." (33a). Absent a monopoly, which is not present here, a distributor may license or not license any entity it wishes.

Harkins Amusement presents an entirely different scenario. Plaintiff in that case challenged an agreement among exhibitors in the Phoenix, Arizona area known in film industry parlance as a "split":

> Splits are exhibitor agreements that divide a normally competitive market by allocating pictures to particular members and prohibiting bidding for licensing rights to films assigned. Phoenix exhibitors met regularly in the mid-1970's and divided rights

> to films on a picture-by-picture basis. Harkins was not a split member.

850 F.2d at 480-81 (citations omitted). The defendants in *Harkins Amusement* included seven regional film exhibitors and nine national film distributors. The distributor defendants acknowledged the existence of the split among the Phoenix area exhibitors which excluded plaintiff, but the distributors argued that they were victims of, not participants in, the split arrangement. The district court granted summary judgment to the defendant distributors on all counts. The primary issue before the court of appeals was whether evidence existed to show that the exhibitors in the split engaged the distributors in their *horizontal* conspiracy.

> Harkins contends that it was excluded from fairly competing for films as a result of active participation by the distributors in the Phoenix split. Of course, if the only function of the split was to eliminate competitive bidding by the split members for the distributors' films, it makes no sense to say that the distributors participated in the split. If the split members, in addition to their agreeing not to bid against each other, also agreed to secure the cooperation of distributors in excluding Harkins from the first-run market, then such a combination would constitute a Sherman Act violation.

850 F.2d at 484.

The court of appeals concluded that sufficient evidence existed to permit an inference that the distributors participated in the unlawful conspiracy: "Harkins has presented factual support of a conspiracy between exhibitors and individual distributors to split the Phoenix film market and unreasonably restrain competition." *Id.* at 485. Thus the existence of a horizontal conspiracy among exhibitors — which is absent from Miramax's relationship with the Ritz — was central to the holding that "the split agreement alleged [by Harkins Amusement] . . . if proven, is illegal *per se*." *Id.* at 486.

See Nynex Corp. v. Discon., Inc., 525 U.S. 128, 119 S. Ct. 493, 498 (1998) (refusing to apply per se rule to case involving only vertical restraints because "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors").

Unlike Orson's analysis, the *Harkins Amusement* court was careful to distinguish between the horizontal split agreement and a "clearance," a vertical relationship whereby a distributor chooses to license a first run film exclusively to one exhibitor in an area, a decision that excludes other exhibitors in that area from exhibiting that film. Indeed, in affirming the district court's grant of summary judgment for the distributors on the claim of unreasonable clearances, the *Harkins Amusement* court relied on the same body of law as the Court of Appeals in this case, extending back to this Court's decision in *United States v. Paramount Pictures, Inc.* 334 U.S. 131 (1948);

> Clearance is a contract term allowing an exhibitor a degree of exclusivity within a particular market. "Clearances preclude distributors from licensing other theaters, either specifically named or encompassed in a named geographic area, from showing a movie while it is being exhibited by the theater whose bid is accepted." *Theee Movies of Tarzana v. Pacific Theaters, Inc.*, 828 F.2d 1395, 1397 (9th Cir. 1987).

850 F.2d at 486. Thus, there is no conflict, but rather only consonance, between *Harkins Amusement* and the Court of Appeals' decision in this case, and there is no basis for the issuance of a writ of certiorari here.

Simply put, the Court of Appeals was right when it concluded that Miramax may distribute films through any exhibitor it chooses, and the antitrust laws do not impose an obligation that Miramax use Orson — either in place of or in addition to the Ritz. The fact that some theatres or consumers might find some Miramax films more desirable than the available alternatives does not make an exclusive agreement

with the Ritz anticompetitive. *See K.M.B. Waterhouse Distributors, Inc. v. Walker Manufacturing Co.*, 61 F.3d 123 (2d Cir. 1995). There, the defendant rejected the plaintiff's request to distribute Walker brand automotive exhaust system products and advised the plaintiff that its existing distributors preferred that Walker not add the plaintiff as a distributor. In *K.M.B.*, the Court of Appeals for the Second Circuit examined the effect on competition of the defendant manufacturer's refusal to supply the plaintiff and determined that Walker's decision to limit its distribution did not violate the Sherman Act because the products of other manufacturers were available to the plaintiff. *Id.* at 128.

Orson's heavy reliance on the irrelevant "split" discussion in *Harkins Amusement* and its liberal use of sinister-sounding terms like "clandestine," "conspiracy," and "group boycott" notwithstanding, Orson has alleged no more that the type of vertical non-price restraint held lawful in many cases both within and outside the film distribution industry. Accordingly, Orson's petition should be denied with respect to its antitrust claims.

II. There is No Reason to Grant Certiorari on Orson's Claim Under the Pennsylvania Act.

A. The United States Copyright Act — as confirmed by this Court's decisions — grants a copyright holder the right to grant an exclusive license, as well as the right to "refuse to license" the copyrighted work.

Section 301(a) of the Copyright Act preempts all state laws that (either facially or as applied) purport to grant, create, or destroy rights that are equivalent to any of the exclusive rights within the scope of the Copyright Act:

> On and after January 1, 1978, all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title. Thereafter, no person is entitled to any

> such right or equivalent right in any such work under the common law or statutes of any state.

Under Section 301, any state law which purports to prohibit the exercise of the copyright holder's exclusive right to distribute copies or exhibit copyrighted works or license to others for up to the term of the copyright, is expressly preempted. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 443 (S.D. Ohio 1980), *aff'd*, 679 F.2d 656 (6th Cir. 1982) (state law is preempted whether it "creates, grants or destroys" exclusive rights granted under the Copyright Act). The Court of Appeals correctly applied that provision to this case.

The rights reserved to copyright holders under Section 106 of the Copyright Act, 17 U.S.C. § 106, include, among others, the following exclusive rights, which are protected by this provision:

> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
>
> (4) in the case of . . . motion pictures . . . , to perform the copyrighted work publicly; . . .

17 U.S.C. § 106.

As this Court has held, these Section 106 rights include the right "to grant an exclusive or restrictive license to others to exhibit [a work]." *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939). Moreover, a "copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work." *Stewart v. Abend*, 495 U.S. 207, 228-229 (1990), *citing Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). So strong is this protection that "nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright." *Id.*; *see also Schnapper v. Foley*, 667 F.2d 102, 114, n.4 (D.C. Cir. 1981) ("Unless there is a specific

exception, we take Congress to have vested in the copyright holder the liberty not to license rights in his work.") The exclusivity of those rights of exploitation by the copyright holder is at the very heart of the Copyright Act's protection and its purpose to foster creation and dissemination of creative works. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

The rights set forth in Section 106 of the Copyright Act do not end after 42 days. To the contrary, the copyright holder's rights under Section 106 last for the full term of the copyright. Nor does a copyright holder's decision to license rights in the first place for a limited period of time eliminate those rights in the future. The copyright holder has the right to enter into a single exclusive license for up to the full copyright term, or a series of successive exclusive licenses for shorter terms.

As interpreted by a panel of the Court of Appeals for the Third Circuit, the 42-day provision both (1) prohibits the copyright holder from licensing its films exclusively to the exhibitor of its choice for more that 42 days, and (2) requires the copyright holder to "expand the run" *to other theatres* after 42 days, thereby implicitly vesting those exhibition rights in those other theaters after 42 days (44a). Because the state law establishes rights equivalent to those granted under federal copyright law, it is preempted.

This Court has recognized the importance to preemption analysis of determining how a law is applied in practice, as well as its language. Determination of whether a statute is preempted requires consideration of the "relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). In this case, the 42-day rule was applied to take away from Miramax and give to Orson rights that are governed by Section 106 of the Copyright Act and that belong exclusively to the copyright holder. Section 301 provides that those rights are governed exclusively by the Copyright Act, and that "no person is entitled to any such right or equivalent right

in any such work under the common law or statutes of any state." Orson's claim divested Miramax of those protections in the following ways.

First, the 42-day provision was applied to impose liability on Miramax for failing to grant a license to Orson. Under the facts of the case, the 42-day provision required Miramax to grant Orson a license against its wishes. Absent the 42-day provision, Miramax would not have chosen to associate its films with the Roxy during their critical first runs.

Second, due to the nature of the geographic market, the 42-day provision was applied here in a manner that would have forced Miramax to terminate exhibition of its films at the Ritz after 42 days. The evidence at trial demonstrated that the Ritz would not exhibit Miramax's films simultaneously with another exhibitor. Thus, the Roxy would have been the *exclusive* exhibitor after 42 days. The jury's verdict acknowledges the fact of this forced termination; profits could have been earned by Orson only if it *replaced* the Ritz as the *exclusive* exhibitor.

Third, Section 203-7 provides that, in addition to making "provision to expand the run" after 42 days, "prints of said feature motion picture *shall be made available by the distributor to those subsequent run theatres* that normally would be served on subsequent run availability." 73 Pa. Stat. Ann. § 203-7 (emphasis added). Thus, in addition to requiring compulsory licensing to the Roxy, Section 203-7, as applied, required Miramax to print additional release prints of its copyrighted films — i.e. to make copies, another one of the exclusive rights reserved to copyright holders under Section 106 of the Copyright Act — and to provide those release prints to third party exhibitors, like the Roxy, with whom Miramax did not wish to do business.

The 42-day provision took from Miramax and gave to Orson the right to exhibit Miramax's copyrighted works and the right to decide who would exhibit those works. Therefore, as applied, it is preempted by Section 301. The absurdity of arguing that a state may compel an artist to display his or her works in an

unwanted gallery is immediately apparent. Similarly, most would think it equally outrageous for a state to compel political writers to make their works available for publication by a magazine or periodical not of their choice. Motion pictures are no less protected by copyright than are other works of art or writings. Miramax, as the copyright holder, has the right under the Copyright Act to select the venue in which its films are to be exhibited. Orson had no right to demand copies of Miramax's films for exhibition, and no state law could permissibly give it that right without violating Section 301.

B. The Court of Appeals correctly followed this Court's precedents in holding that a state law which restricted a copyright holder's right to grant an exclusive license, or which restricted the copyright holder's unilateral decision to refuse to grant a license, was preempted by federal law.

The Supremacy Clause of the United States Constitution declares that statutes enacted by the United States Congress are the "supreme law of the land." U.S. Const., Art. VI. A state law is preempted if it purports to govern matters which are the subject of a federal law and it conflicts with the federal law; this is referred to as "conflict preemption." *See Mite Corp. v. Dixon*, 633 F.2d 486, 491 (7th Cir. 1980) ("Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict.")

Under "conflict preemption," a state law is preempted if, " 'under the circumstances of this particular case, [the] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Jones v. Rath Packing Co.*, 430 U.S. at 526-527 (citation omitted); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974). This Court has held that "[w]hen state law touches upon the area of [patent or copyright statutes], it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied,' by the state law." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225,

229 (1964), *quoting Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

Lower courts have not hesitated to apply this rule to invalidate state laws that prohibit the exercise of rights reserved to copyright holders under section 106 of the Copyright Act. *See, e.g., Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1536 (M.D. Ala. 1992) (*citing Associated Film Distributions Corp. v. Thornburgh*, 683 F.2d 808, 816 (3d Cir. 1982)) ("[a] copyright holder cannot be subject to a state-law created liability simply because it engaged in protected copyright activity").

In *Storer Cable*, the court held that a local ordinance which prohibited producers of television programs from entering into exclusive licenses with cable operators for exhibition of those programs was preempted by the Copyright Act:

> [I]t is apparent that the two preemption inquiries, conflict preemption and § 301 express preemption, lead to the same essential question: If Ordinance 48-90 creates liability for a copyright holder and a licensee *simply because the copyright holder granted an exclusive license to exhibit her work*, then the ordinance cannot stand under the copyright laws. *Exclusive licensing is one of the rights in the copyright monopoly and is in and of itself not anti-competitive behavior, and thus local governments may not ban the practice per se.*

Id. at 1536 (emphasis added); *see also Association of Am. Medical Colleges v. Cuomo*, 928 F.2d 519, 523 (2d Cir. 1991) (state law requiring disclosure of copyrighted test materials would be preempted if not protected as "fair use" under Copyright Act), *cert. denied*, 502 U.S. 862 (1991); *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 574-575 (4th Cir. 1994) (state trade secret law may not be used to prevent copyright holder from exercising right to publish copyrighted work.)

In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710-711 (1984), this Court considered a state law which required

local cable operators to delete liquor commercials from programming. The Court held that, even though the law did not expressly prohibit exercise of protected rights, the law was preempted because requiring cable operators to modify the programming would have the effect of causing them to lose the benefit of compulsory licenses provided to cable operators under the Copyright Act. The state law at issue conflicted both with FCC regulations governing cable operators and with provisions of the Copyright Act addressing compulsory licenses. Therefore, it was preempted because the "state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law." *Id.* at 716.

Similarly, in *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519, the Second Circuit held that a state law that compelled a College Entrance Examination Board to disclose copyrighted test materials would be preempted unless it were protected as a "fair use" under the Copyright Act. *AAMC v. Cuomo*, 928 F.2d at 523. On remand, in *College Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995), the district court applied this rule and issued an injunction against enforcement of the law, because it interfered with the copyright holder's exercise of the exclusive right under the Copyright Act to decide when and to whom to disseminate its copyrighted material.

> Given the broad disclosure requirements of the STA, the Court is left with the inescapable conclusion that the STA interferes with the moving plaintiffs' exclusive ownership rights as set forth in section 106 of the Copyright Act. It does so, for example, by requiring those plaintiffs to disclose their test forms and the individual test questions which, for various reasons, they wish not to disclose.

College Entrance Examination Bd. v. Pataki, 889 F. Supp. at 564.

Here, the jury's verdict imposed liability on Miramax under the 42-day provision simply for exercising one of the rights the

Copyright Act specifically grants, the right to grant an exclusive license with an exhibitor of its choice with a term longer than 42 days. Thus, the state statute denies a copyright holder benefits that the Copyright Act affords it — the grant of exclusive rights under Section 106 for the full term of copyright protection.

Orson does not seriously dispute that the 42-day provision conflicts with the grant of exclusive rights under the Copyright Act. Instead, Orson argues that conflict preemption may not even be considered because the Copyright Act contains an express preemption clause.[8] As support for this argument, Orson cites this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a case that did not involve the Copyright Act. Orson's reliance on *Cipollone* is misplaced; the argument that *Cipollone* forecloses consideration of implied preemption by any statute containing an express preemption clause was specifically rejected by this Court in its later opinion in *Freightline Corporation v. Myrick*, 514 U.S. 280 (1995).

In *Myrick*, the plaintiff cited *Cipollone* for the proposition that implied preemption could not be considered where a statute includes an express preemption provision. 514 U.S. at 287. This Court disagreed, holding that, even where an express preemption clause has been enacted, a state law may still be preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at 287-288.

> As an initial matter, we must address the argument that we need not reach the conflict preemption issue at all. According to respondents and the Court of Appeals, *Cipollone v. Liggett Group, Inc.*, . . . held that implied preemption cannot exist when Congress has chosen to include an express preemption clause in a statute. This argument is without merit. . . .
>
> The fact that an express definition of the preemptive reach of a statute "implies" — i.e.,

8. The judgment could indeed be affirmed on express preemption grounds. However, this issue need not be addressed because the Court of Appeals' conflict preemption analysis is correct.

> supports a reasonable inference — that Congress did not intend to preempt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption . . . At best, Cipollone supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule.

Myrick, 514 U.S. at 288-289 (citation omitted). Indeed, as this Court noted in *Myrick*, *Cipollone* considered whether the statute at issue conflicted with federal law, even though the federal law contained an express preemption provision.

Moreover, the language in *Cipollone* on which Orson relies applies only to "field preemption" based on Congressional intent to occupy an entire field, and *not* to conflict preemption that arises when a state law actually conflicts with a federal statute. *Cipollone*, 505 U.S. at 517. By contrast, under the circumstances presented here, the Supremacy Clause requires that the state law give way to the federal statute.

This Court (and lower courts) have used "conflict preemption" to strike down state laws that prohibit activity protected by the Copyright Act. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 710-711 ("such a loss of viewing options would plainly thwart the policy identified by both Congress and the FCC of facilitating and encouraging the importation of distant broadcast signals."). These precedents are applicable here.

C. The Court of Appeals' decision is consistent with, and indeed supported by, this Court's decision in *Interstate Circuit* and other cases involving concerted refusals to deal.

Orson contends that the Court of Appeals' decision that the 42-day provision is preempted by the Copyright Act conflicts with prior decisions of this Court upholding the power of the states and the federal government to prohibit agreements in restraint of trade. The cases Orson cites are inapplicable. They did not involve the mere granting of exclusive licenses permitted

by the Copyright Act; rather they dealt with the "additional elements" of combinations and agreements in restraint of trade.

Cases such as this Court's opinion in *Interstate Circuit v. United States*, 306 U.S. 208 (1939), address the power of states and the federal government to regulate concerted anti-competitive conduct by copyright holders.[9] By contrast, the 42-day provision is not an antitrust law directed at combinations in restraint of trade. Instead, it prohibits unilateral decisions that copyright law otherwise permits, namely, the granting of exclusive licenses of longer than 42 days. No case has ever upheld such a blanket exercise of state power over rights protected by the Copyright Act.

Interstate Circuit addressed the validity of the federal antitrust laws as applied to a horizontal agreement among competing distributors to take uniform action with respect to exhibitors in order to help a single powerful exhibitor. The Court upheld the power of the states to prohibit such concerted action, *notwithstanding* that copyrighted works were involved: "Although the films were copyrighted, appellants do not deny that the conspiracy charge is established if the distributors *agreed among themselves to impose the restrictions upon subsequent-run exhibitors*." *Id.* at 221 (emphasis added). Thus, the conduct proscribed in *Interstate Circuit* was not the exercise of exclusive rights under the Copyright Act. To the contrary, the Court recognized that those rights constitute a "legal monopoly" protected by the Copyright Act, and emphasized that the Copyright Act empowers film distributors "to exhibit the picture *and to grant an exclusive or restrictive license to others to exhibit it*." *Id.* at 227 (emphasis added).

The Court explained that while each distributor individually, as a copyright holder, had the right to impose exclusive restrictions on their exhibitors by *individual action*, the same

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9. Orson also cites this Court's decision in *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932). That decision upheld the power of states to tax the proceeds of film licenses, and did not address the power of the states to regulate the terms of those licenses.

restrictions were not so protected when they were pursuant to an agreement *among competitors* to restrain competition. This critical distinction is explained in the following passage:

> Granted that each distributor, in the protection of his own copyright monopoly, was free to impose the present restrictions upon his licensees, we are nevertheless of the opinion that they were not free to use their copyrights as implements for restraining commerce in order to protect Interstate's motion picture theatre monopoly by suppressing competition with it. *The restrictions imposed upon Interstate's competitors did not have their origin in the voluntary act of the distributors or any of them. They gave effect to the will and were subject to the control of Interstate, not by virtue of any copyright of Interstate, for it had none, but through its contract with each distributor.*

Id. at 228 (emphasis added).

United States v. Paramount Pictures, 334 U.S. 131 (1948), makes this very point. There, the Court upheld the power of the federal government to prohibit price fixing by copyright holders. The Court noted specifically that the exclusive rights set forth in Section 106 of the Copyright Act give rise to a protected monopoly, and liability could not be imposed merely for exercise of that monopoly. However, that monopoly did not allow a copyright holder to use those protected rights as "a part of the general plan to suppress competition." *Id.* at 144.

Similarly, in *Watson v. Buck*, 313 U.S. 387 (1941), the Court upheld a state law barring price fixing combinations among authors, publishers and other copyright holders. As in *Paramount Pictures*, the proscribed conduct was not the use of exclusive licenses, but "combinations in restraint of trade." *Id.* at 404. *Watson* merely authorizes states to regulate such combinations, not to enact prohibitions that go to the heart of the grant of rights under copyright. In sum, these decisions in no way support Orson's contention that a state may permissibly attack the "legal

monopoly" granted to copyright holders under the Copyright Act.

D. The decision of the Court of Appeals for the Third Circuit in this case is consistent with the Sixth Circuit's decision in *Allied Artists*, which Orson admits did not contain a restraint on the copyright holder's ability to grant an exclusive license.

In an attempt to create a basis for arguing that a "conflict among the circuits" requires this Court to grant *certiorari*, Orson asserts that the Third Circuit's decision in this case conflicts with an earlier Sixth Circuit decision in *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982), *aff'g*, 496 F. Supp. 408 (S.D. Ohio 1980). However, Orson acknowledges its own error when it notes that "the Ohio legislation at issue in *Allied Artists* does not contain a provision limiting the duration of exclusive 'first run' film licenses" (Petition at 17). This critical distinction eliminates the basis for its concocted "conflict" with respect to the 42-day provision.

Allied Artists involved an Ohio statute that, like the Pennsylvania Act, regulated certain marketing practices by motion picture distributors, such as "blind bidding." Those provisions were upheld by the Sixth Circuit, and, consistent with that holding, the Third Circuit likewise upheld comparable provisions, such as prohibitions against blind bidding, in the Pennsylvania Act. The Sixth Circuit never considered a provision that flatly prohibited exclusive licenses of longer than a legislated period because the Ohio statute included no such regulation.

Allied Artists makes it clear that, had the Sixth Circuit considered a statute with a provision comparable to the 42-day provision, it would have reached the same result as the Third Circuit in this case. In *Allied Artists*, the Court of Appeals upheld the Ohio statute precisely because it did *not* "deprive motion picture copyright owners of their rights to prohibit reproduction, performance, distribution or display of their work; nor does it vest the rights to reproduction, performance or display in

exhibitors or any other person." *Allied Artists*, 679 F.2d at 663. That, however, is precisely what the 42-day provision does. Far from contradicting the Third Circuit, the Sixth Circuit explicitly recognized that its holding on preemption would have been quite different had it been faced with a law which, like Pennsylvania's 42-day rule, both deprived the copyright holder of its right to prohibit exhibition of its works through exclusive licenses, and vested that right in others.

In a footnote, Orson cites *Storer Cable Communications v. City of Montgomery, Ala.*, 806 F. Supp. 1518 (M.D. Ala. 1992), as further support for its argument that the Third Circuit's decision conflicts with decisions of other courts (Petition at 17, n.8). This citation is surprising, because the district court in *Storer Cable* held the Copyright Act preempted a state law that made exclusive licenses *per se* illegal, while upholding other portions of the same law that invalidated such licenses upon proof that they had an anti-competitive effect. Like other courts, the *Storer Cable* court distinguished between laws that regulate agreements in restraint of trade (that this Court has held not preempted) and laws that simply prohibit copyright holders from granting exclusive licenses in their works (which are preempted). *Storer Cable*, 806 F. Supp. at 1538-1539.

In sum, the Third Circuit's decision was completely consistent with, and compelled by, all prior applicable precedent, the law of sister circuits, and the language of the Copyright Act and Supremacy Clause. The Court of Appeals correctly held that the 42-day provision was preempted.

CONCLUSION

For the foregoing reasons, respondent Miramax Film Corp. respectfully requests that this Court dismiss the Petition for Certiorari of petitioner Orson, Inc.

Respectfully submitted,

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No. 99-866

IN THE

Supreme Court of the United States

ORSON INC.,

Petitioner,

v.

MIRAMAX FILM CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF THEATER OWNERS OF PENNSYLVANIA IN SUPPORT OF PETITIONER

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Other Authorities:

Niva Elkin — Koren, *Copyright Policy and Limits of Freedom of Contract*, 12 Berkeley Technology Law Journal, http:\\www.law.berkeley.edu\journals\btlj\articles\12-1\koren.html 11

I. Trotter Hardy, *Contracts, Copyright and Preemption in a Digital World*, 1 Rich.J.L.& Tech. 2 (1995), http:\\www.richmond.edu.jolt\vlil\ hardy.html 11

Maureen A. O'Rourke, *Copyright Preemption After the PROCD Case: A Market Based Approach*, 12 Berkeley Technology Law Journal, http:\\www.law.berkeley.edu\journals\btlj\articles\12-1\orourke.html 11

INTERESTS OF THE *AMICUS*

Amicus Curiae, the National Association of Theatre Owners of Pennsylvania ("NATO of PA"), is a Pennsylvania not-for-profit corporation.[1] It serves as the Pennsylvania trade association for motion picture exhibitors, whose members are the owners and operators of many of the motion picture theatres which exhibit feature motion pictures at locations throughout the Commonwealth of Pennsylvania. Some are "first run" theatres, some are "second run" or "subsequent run" theatres. Some exhibit commercial motion pictures, others exhibit so-called art pictures. All exhibitors, together with the movie-going public, are the beneficiaries of the provisions of the Pennsylvania Feature Motion Picture Fair Business Practices Law, 73 P.S. § 203-1 *et seq.* (the "Law").

In the 20 years since the Law was enacted, the foresight of the Pennsylvania General Assembly in passing the Law has been borne out by the tremendous growth in the number and size of motion picture exhibitors in Pennsylvania. Some of this growth — particularly the growth in Pennsylvania of national exhibitors such as American Multi-Cinema, Inc., United Artist Theatre Circuit and Regal Cinemas, however, is not unique to Pennsylvania and reflects national trends. What has been unique, however, has been both the resiliency and growth of smaller circuits and all independent theatres, as well as the continued viability of one and two screen theatres in Pennsylvania, all contrary to the national trend. Much of this growth and viability can be attributed to the provisions of the Law and in particular to the provisions of

1. No counsel for a party authored any part of this *amicus curiae* brief, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief. (Rule 37.6 of the Supreme Court of the United States).

Section 203-7 of the Law, the so-called "42 day rule." For small theatres the 42 day rule has been a life preserver which not only has helped small businesses survive but has enabled small exhibitors to grow. As the record in this case apparently demonstrates, absent some version of the 42 day rule, independent exhibitors will find it almost impossible to obtain quality feature motion pictures in a reasonable time period, and in many instances will not be able to remain in business.

NATO of PA submits this *amicus curiae* Brief because it believes that the opinion *en banc* of the United States Court of Appeals for the Third Circuit erred as a matter of law in the manner in which the Court chose to construe the 42 day rule. A construction of the 42 day rule is fairly possible by which a constitutional question of preemption may be avoided. This Court should grant certiorari for this reason alone, to reverse the unnecessary and incorrect construction placed on the 42 day rule by the Third Circuit.

Moreover, NATO of PA believes certiorari should be granted to allow for this Court to consider and address what rights are included within the grant of copyright, and particularly whether the Court of Appeals *en banc* erred in concluding that the 42 day rule prohibits the copyright holder from exercising rights protected by the Copyright Act.

Finally, this case presents an excellent opportunity for this Court to both explore and define the scope and limits of federal preemption and the copyright laws. The scope of federal preemption of state laws is already before this Court in three other cases this term; this case presents an excellent opportunity to deal with the question in the context of copyright.

All parties have consented to the filing of this *amicus* brief as reflected in a Stipulation of Consent separately submitted to this Court. Pursuant to the Court's rules, the *amicus* brief brings relevant matter to the attention of the Court, from the perspective of NATO of PA, which was not already brought to the Court's attention by the Petitioner. (Rule 37.1 of the Supreme Court of the United States). Every effort has been made to avoid or minimize duplication with Petitioner's brief.

SUMMARY OF ARGUMENT

This Court has consistently held when a statute is reasonably susceptible of two constructions, by one of which it is unconstitutional and the other valid, the court should adopt the interpretation which will uphold the statute. The Court of Appeals *en banc* has acknowledged that the 42 day rule is susceptible of two constructions. The plain language of the statute, that a license for more than 42 days merely needs to make *provision* to expand the run, does not mandate any activity with respect to distribution of the copyrighted motion picture and can be interpreted in a manner by which the constitutionality is saved. The *en banc* Court of Appeals for the Third Circuit erred by construing the statute in a manner which leads to its unconstitutionality.

While any contractual sale or license of a motion picture is copyright based, the purpose of the copyright law is not to establish elements of the bargain between distributor and exhibitor. Contracts do not create exclusive rights, but merely allocate rights between the parties. Just as the distributor and exhibitor are free to negotiate and bargain as to contractual terms, the state legislature is free to address practices in the bargaining which the legislature believes to

be inequitable and against public policy, all without impacting on copyright.

This Court has already heard argument in three cases this term dealing with whether a court should consider implied or conflict preemption where Congress has already expressed its intent in the form of express statutory preemption. This case presents an excellent opportunity to consider the same question under the Copyright Act.

ARGUMENT

The Court of Appeals *En Banc* Erred by Failing to Construe the 42 Day Rule in a Manner Which Does Not Lead to its Unconstitutionality.

The determination of the constitutionality of the 42 day rule under the Law has had a long and tortuous history before the federal courts.

In *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3rd Cir. 1982) ("*AFD I*"), reversing 520 F. Supp. 971 (E.D. Pa. 1981), the United States Court of Appeals for the Third Circuit reversed a grant of summary judgment by the district court, which summary judgment had held, *inter alia*, that the 42 day rule was preempted by the Copyright Act. In *AFD I* the Court of Appeals rejected an argument that the 42 day rule was facially preempted.

In *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369 (3rd Cir. 1986) ("*AFD II*"), *cert. denied*, 480 U.S. 933 (1987), *affirming*, 614 F. Supp. 1100 (E.D. Pa. 1985), the Court of Appeals, after trial before the district court, once again affirmed the constitutionality of 42 day

rule against a preemption challenge. The Court held that the decision in *AFD I* conclusively established that the 42 day law was not preempted by the Copyright Act. 800 F.2d at 375.

In *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3rd Cir. 1996) ("*Orson I*"), the Court of Appeals rejected the copyright challenge to the 42 day rule on the basis of *AFD I* and *AFD II* since the Pennsylvania law "on its face contains no threat to the copyrights themselves . . ." 79 F.3d at 1373 n.14.

From 1986 when the Court of Appeals issued its opinion in *AFD II* and upheld the constitutionality of the 42 day rule through, and including the panel decision of the Court of Appeals in *Orson I,* the constitutionality of the 42 day rule was a closed question. Not until the subsequently vacated panel decision of the Court of Appeals in this case (found at 174 F.3d 377 (3rd Cir. 1999)), which opinion chose to ignore both the law of the case doctrine and the Third Circuit's own Internal Operating Procedure 9.1, did the question of the constitutionality of the 42 day rule once again surface.[2] Apparently based on the irregularity, the Third Circuit Court of Appeals correctly chose to vacate the panel decision and review the case *en banc.* Upon *en banc* review, it issued substantially the same opinion as the prior vacated panel decision and held 73 P.S. § 203.7 to be unconstitutional.

As *amicus curiae*, NATO of PA vehemently disagrees with the manner in which the Court of Appeals *en banc*

2. NATO of PA did not participate as a party or an *amicus curiae* in the *Orson* case prior to the panel decision, as exhibitors had no reason to suspect the constitutionality of the 42 day rule was an open issue.

construed the language of the 42 day rule. 73 P.S. § 203-7 provides:

> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

Before any decision as to whether the 42 day rule is preempted, the Court must "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 119 S. Ct. 1624, 1637 (1999); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998). When a statute is reasonably susceptible of two constructions, by one of which it is unconstitutional and by the other valid, the Court should adopt the interpretation which would uphold the statute. "[E]very reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

It is remarkable, that in the opinion *en banc*, the Third Circuit apparently chose not to apply this venerable rule of statutory construction. Rather than analyze the statutory language of the 42 day rule itself, the Court of Appeals

en banc instead jumped to the conclusion that it could see "no reason why the Pennsylvania legislature would have permitted consecutive forty two (42) day licenses to the same exhibitor." 189 F.3d at 381. In *AFD II*, the same court had previously concluded that the plain language requires a distributor to make provision "to *expand* the run to second run or subsequent run theatres within the geographical area" and to make available prints of its feature films "to . . . subsequent run theatres. . . ." 860 F.2d 369 at 377 (3rd Cir. 1986).

The court *en banc* here readily acknowledged that the statutory language is " 'sufficiently vague' to permit alternate readings" (citing *Orson, Inc. v. Miramax Film Corp.*, 862 F. Supp. 1378 at 1387 (E.D. Pa. 1994)); and that it was inartfully drafted, such that both various distributors and exhibitors interpret its requirements differently (citing *Associated Film Distribution Corp. v. Thornburgh*, 614 F. Supp. 1100 at 1111 (E.D. Pa. 1985)). *See* 189 F.3d at 380. Given such concession, it is both contrary to the rule which requires that a statute be interpreted in a manner by which the constitutionality of the statute is saved and logically inconsistent for the court *en banc* to conclude that the exclusive first run must be expanded after 42 days.

Following the original constitutional trial in *Associated Film Distribution Corp. v. Thornburgh*, the district court, which had heard the evidence and understood how motion pictures are in fact licensed, rejected the construction of the 42 day rule that no theatre may play a film for longer than 42 days. 614 F. Supp. 1100 at 1111. The district court logically reasoned that there is no support for such an interpretation in Section 203.7. The express statutory

language does not prevent distributors from contracting for runs for longer than six (6) weeks. It merely says that if such a contract is made, it must contain some *provision* for expanding the run within the geographical area after the 42nd day. Read literally, the statute does not prevent a distributor from entering into a series of exclusive licenses with one exhibitor as long as each license does not exceed 42 days. 614 F. Supp. at 1123-1124.

The Third Circuit Court of Appeals *en banc* has improperly placed emphasis on the word expand. The statute literally provides that "no license shall be entered into . . . for more than 42 days without *provision* to expand the run . . ." (emphasis applied). The plain language places the emphasis on merely making *provision*, allowing for possible expansion, rather than mandatory expansion.

The plain language of the 42 day rule does not prevent distributors from contracting for runs of longer than six (6) weeks. All that the statute says is that if a contract for more than 42 days is entered into, than the license must provide the opportunity for the distributor to expand the run within the geographical area to second or subsequent run theatres. If the license is for less than 42 days, there is no requirement whatsoever that the run must be expanded. Even if the license is for more than 42 days, there is no requirement in the statute that a distributor, acting in good faith and exercising its reasonable business judgment and faced with multiple requests to license the motion picture, is required to accept an offer to license the motion picture by any particular second run or subsequent run theatre. Finally, there is nothing in the 42 day rule which should have led the court *en banc* to conclude that there is no language in the 42 day rule which prevents a distributor from entering into series of exclusive

licenses with one exhibitor as long as each license does not exceed 42 days.

As this Court has said many times, acts of the legislature — whether Congress or the Pennsylvania General Assembly — are presumed to be constitutional. *Jones v. United States*, 119 S. Ct. 1215, 1222 (1999); *Edward J. DeBartolo Corp. v. Florida Coast Gulf Bldg. and Constr. Trades Council, supra*, 485 U.S. at 575 (1988). Section 203-7 of the Law is readily susceptible to construction by which the constitutional question of preemption need not be reached.

The Court of Appeals *En Banc* Erred As the Rights Granted in a Copyright Do Not Limit the Ability of the Distributor and Exhibitor to Contract or the Ability of the State to Address Inequities in Such Contractual Bargaining.

Preemption is strong medicine. Its exercise is not lightly to be presumed. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The conclusion reached by the Third Circuit Court of Appeals *en banc*, that the "42 day rule is copyright based in essence" and thus must be pre-empted under conflict preemption, misapplies both the purposes of the Copyright Act and what the 42 day rule seeks to accomplish. This Court should grant the Petition for Writ of Certiorari in order to delve more deeply into both the purpose of the grant of copyright and what the 42 day rule actually seeks to accomplish. Such examination would lead this Court to reverse the opinion of the Court of Appeals.

The 42 day rule is not directed at any of the rights granted under 17 U.S.C. § 106. More specifically, 73 P.S. § 203-7

does not seek to prohibit distribution of motion pictures in Pennsylvania. To the contrary, the provisions of the 42 day rule are directed at certain contractual provisions contained in the motion picture distributors' nonnegotiable license agreements which deal with length of run and exclusivity.[3] Such contractual provisions are not controlled by the Copyright Act.

Copyright law represents a balance devised by Congress to advance the public interest which on the one hand provides incentive to authors to create, and on the other hand attempts to safeguard the free flow of information on which the creativity is based. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

NATO of PA recognizes that preemption questions under copyright law can and do arise with regard to nearly any state law that might tangentially apply to informational works. The laws of contract and unfair competition are no different. Preemption issues arguably arise whenever an authors' or users' copyright rights appear to be either enlarged or reduced by contract.

The fallacy of the reasoning of the court *en banc* is its failure to recognize that any contractual sale or license of a

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3. The legislative findings and purposes for the Pennsylvania Law are set forth in 73 P.S. § 203-2. The legislative findings and purposes for the 42 day rule are to enable feature motion pictures to be exhibited at many different locations without delay, thereby promoting wide geographical dissemination at reasonable prices to the public of ideas, opinions and artistic expression in feature motion pictures. 73 P.S. § 203-2 (1, 4, 5, 9).

motion picture is copyright based in essence. If the court *en banc* is correct, the transferee or licensee of a motion picture or any copyright work can never sue the copyright holder for breach of contract because of the protections and rights granted to the copyright holder under the Copyright Act. Any such suit for breach of contract would be preempted. Obviously there are no cases which suggest such an absurd result. A simple transfer of rights is unlikely to be challenged on preemption grounds because such transfer is the revenue generating means of the distributor's creative efforts. I. Trotter Hardy, *Contracts, Copyright and Preemption in a Digital World*, 1 Rich.J.L.& Tech. 2 (1995), http:\\www.richmond.edu.jolt\vlil\ hardy.html.

The Copyright Act establishes the right of the copyright holder in intangibles. The Copyright Act was not intended to serve as a means of defining specific rights and duties with regard to the use of intangibles.[4] The Copyright Act is to provide a backdrop for negotiations and bargains, not to predetermine itself liabilities. In other words, it does not follow from the Copyright Act that any attempt to limit the rights of the copyright holder by contract is pre-empted.

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4. I. Trotter Hardy *Contracts, Copyright and Preemption in a Digital World, supra.* In 1995, Hardy freely admitted at footnote 33 that he could find not specific authority for this view. Yet since his article, this dichotomy and the substantially different results to which it leads has been recognized by other academic discussions as well as in cases. *See, e.g.*, Niva Elkin — Koren, *Copyright Policy and Limits of Freedom of Contract*, 12 Berkeley Technology Law Journal, http:\\www.law.berkeley.edu\journals\btlj\articles\ 12-1\koren.html; Maureen A. O'Rourke, *Copyright Preemption After the PROCD Case: A Market Based Approach*, 12 Berkeley Technology Law Journal, http:\\www.law.berkeley.edu\journals\btlj\articles\ 12-1\orourke.html.

Contract law, not copyright law, governs bargaining, the transferability of rights held by the copyright holder. Contract law cannot alter or change the initial grant of the copyright. An exhibitor has no right to change the content of the motion picture, to copy the motion picture, to exhibit without license or purchase, or to prevent any distribution by the distributor.

Nevertheless, the distributor and the exhibitor are free to establish contractual terms for sale or license as with any other bargain. *PROCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). In *PROCD, Inc. v. Zeindenberg*, *supra*, the Seventh Circuit specifically held that contract rights cannot be the equivalent to rights under copyright, because contracts do not "restrict the options of person who are strangers to the author." 86 F.3d at 1454. The Seventh Circuit concluded that the contracts must be enforceable under 17 U.S.C. § 301 because contracts do not create "exclusive" rights but only allocate rights between the parties: "whether a particular license is generous or restrictive, a simple two-party contract is not equivalent to any of the exclusive rights within the general scope of the copyright." 86 F.3d at 1455.[5]

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5. Other Circuits have been unwilling to go quite as far as the Seventh Circuit, and require that in order for preemption not to occur, the state law violation must be predicated upon an act "incorporating elements beyond mere reproduction and the like . . . ," the so called "extra element." *Harper & Row Publishers v. Nation Enterprises*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1993). Restrictions against unfair competition meet this extra element.

All cases dealing with contract have limited their analysis to Section 301 of the Copyright Act and have not addressed conflict preemption.

Just as the distributor and exhibitor are free to negotiate and bargain as to the terms and provisions of the contract or license, the state legislature is free to address practices in the bargaining which it believes are inequitable and against public policy, all without impacting on the copyright. The efforts by the Pennsylvania Legislature to address the inherent unfairness and negative public policy of the long term exclusive license is really no different than any of the other practices addressed by the Law which the Third Circuit upheld in *AFD I* and in *AFD II*. Copyright interests are not affected or are at best tangentially impacted when states govern the terms of commercial bargains or transactions, including the terms of contracts. *See also Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980), *affirmed in part, reversed in part*, 679 F.2d 656 (6th Cir. 1982); *Warner Bros. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981), *appeal dismissed*, 782 F.2d 136 (10th Cir. 1985).

This case presents a significant opportunity for this Court to address the true nature of copyright, the ability of parties to contractually bargain, and the ability of the state legislature to deal with what it perceives to be unfair and inequitable provisions which are against the state's public policy. For these reasons, NATO of Pennsylvania respectfully requests this Court to grant the Petition for Writ of Certiorari.

This Case Presents an Excellent Opportunity For This Court To Rethink Preemption Law in the Copyright Field Generally

In its Petition for Writ of Certiorari, petitioner has argued that, under *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), express preemption, rather than implied or conflict preemption, should control when Congress has made

clear that it intends to expressly preempt an area. The Court should not be free to also consider conflict preemption in such situations, *i.e.*, "There is no need to infer Congressional intent to preempt state laws from the substantive provisions" of the legislation. NATO of Pennsylvania does not intend to repeat that argument herein.

However, this Court has already heard argument in three cases this term which deal with this precise issue, *Geier v. American Honda Motor Co.*, No. 98-1811, *United States v. Locke*, No. 98-1701 and *International Association of Independent Tanker Owners v. Locke*, No. 98-1706. This case presents an excellent opportunity for the Court to consider the same rationale within the sphere of copyright. This Court has always treated copyright as similar to, but not exactly the same as other preemption. Particularly since the enactment of the 1976 Copyright Law, this Court has begun to look more closely at express copyright preemption, as opposed to implied or conflict preemption issues. This case presents an excellent opportunity, as suggested by Petitioner to the Court, to review whether the law is preempted solely by express preemption under 17 U.S.C. § 301, and reject any review under implied or inferred conflict preemption.

CONCLUSION

For the reasons set forth herein, *Amicus Curiae* NATO of PA respectfully requests that the Petition of Orson, Inc. for Writ of Certiorari be granted.

Respectfully submitted,

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